12/60/50

40371

LAWRENCE A. BARRETT, as Successor Trustee, etc.,

Plaintiff - Appellee,

v.

MORRIS HEICHMAN,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

300 I.A. 605

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with causes numbered 40370, 40372, 40373 and 40374 in this court. We have today filed an opinion in cause No. 40370, entitled, Lawrence A. Barrett, as Successor-Trustee, etc., Plaintiff-Appellee, v. Mark Shanks, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in that case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in cause No. 40370, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defense to place the cause at issue and to try same before a jury.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, J. CONCURS;
BURKE, J. DISSENTS.

40372

LAWRENCE A. BARRETT, as Successor Trustee, etc., Plaintiff - Appellee, v. REINHARDT VOLKMAN, Defendant - Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

300 I.A. 605

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with causes numbered 40370, 40371, 40373 and 40374 in this court. We have today filed an opinion in cause No. 40370, entitled, Lawrence A. Barrett, as Successor Trustee, etc., Plaintiff-Appellee, v. Mark Shanks, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in that case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in case No. 40370, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defense to place the cause at issue and to try same before a jury.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HEBEL, J. CONCURS;
BURKE, J. DISSENTS.

40272

LAWRENCE A. LAMPITT, as Successor Trustee, etc.,

Plaintiff - Appellee,

v.

RICHARDT VOLKMER,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

HONORABLE DENNIS

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with causes numbered 40271, 40272, 40273 and 40274 in this court. We have today filed an opinion in cause No. 40270, entitled, Lawrence A. Lampitt, as Successor Trustee, etc., Plaintiff-Appellee, v. Mark Hanna, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in this case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in case No. 40270, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defendants to plead the bar of issue and to try same before a jury.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN,
ROBERT J. GUARNIERI,
JUSTICES.

40373

LAWRENCE A. BARRETT, as Successor Trustee, etc.,

Plaintiff - Appellee,

v.

R. A. GARDNER,

Defendant - Appellant.

) APPEAL FROM

) SUPERIOR COURT

) COOK COUNTY.

300 I.A. 605

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with causes numbered 40370, 40371, 40372 and 40374 in this court. We have today filed an opinion in cause No. 40370, entitled, Lawrence A. Barrett, as Successor Trustee, etc., Plaintiff-Appellee, v. Mark Shanks, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in that case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in cause No. 40370, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defense to place the cause at issue and to try same before a jury.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, J. CONCURS;
BURKE, J. DISSENTS.

4027T

LAWRENCE A. BURNETT, as Commissioner
Trustee, etc.,

Plaintiff - Appellee,

v.

T. A. DIXONSE,

Defendant - Appellant.

Mr. PRESIDING JUSTICE DAVIS E. SMALTZER DELIVERED THE OPINION OF THE COURT:

This cause was consolidated with causes numbered 4027C, 4027I, 4027O and 4027A in this court. We have today filed an opinion in cause No. 4027C, entitled, Lawrence A. Burnett, as Commissioner Income, etc., Plaintiff-Appellee, v. Dale Stamps, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in that case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in cause No. 4027C, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defendant to plead the issue and to try such issue before a jury.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

DAVIS, J. DISSENTS;
TRUEBLOOD, J. CONCURS.

40374

LAWRENCE A. BARRETT, as Successor Trustee, etc.,	)	APPEAL FROM
Plaintiff - Appellee,	)	SUPERIOR COURT
v.	)	COOK COUNTY.
J. D. WALLACE,	)	
Defendant - Appellant.	)	300 I.A. 606

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with causes numbered 40370, 40371, 40372 and 40373 in this court. We have today filed an opinion in cause No. 40370, entitled, Lawrence A. Barrett, as Successor Trustee, etc., Plaintiff-Appellee, v. Mark Shanks, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in that case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in cause No. 40370, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defense to place the cause at issue and to try same before a jury.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, J. CONCURS;
BURKE, J. DISSENTS.

40174

LAWRENCE A. BARRETT, as Receiver)
Trustee, etc.,)
)
Plaintiff - Appellee,)
)
v.)
)
L. G. MILLER,)
)
Defendant - Appellant.)

Mr. Presiding Justice DRUCK delivered the opinion of the court.

This cause was originally had with cause numbered 40170, 40171, 40172 and 40173 in this court. We have today filed an opinion in cause No. 40170, entitled, Lawrence A. Barrett, as Receiver Trustee, etc., Plaintiff-Appellee, v. Max Shuman, Defendant-Appellant, in which the decree of the Superior Court was reversed and the cause remanded with directions. The facts and circumstances in that case are similar to the instant case and the law controlling in that case is applicable to this case.

For the reasons stated in cause No. 40170, aforesaid, the decree of the Superior Court is reversed and the cause is remanded with directions to permit the defendant to plead the cause of issue and to try same before a jury.

REVERSED AND REMANDED WITH DIRECTIONS.

DRUCK, J. CONCUR;
MEYER, J. DISSENTS.

40320

PHILLIP BRENNER,
(Plaintiff) Appellant,
v.
LINCOLN DAIRY COMPANY, et al.,
(Defendants) Appellees.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

300 I.A. 606

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered May 25, 1938, sustaining motions to dismiss the amended complaint and dismissing the cause.

Phillip Brenner, plaintiff, who was a judgment creditor, brought suit against the defendants. The defendants filed motions to strike the amended complaint, which motions were sustained and the case dismissed at plaintiff's costs.

The allegations of the amended complaint admitted by the motions to dismiss, are, in substance, that the Lincoln Dairy Company was incorporated February 24, 1933, and continued to operate under its charter in Chicago until June 18, 1935, when it was dissolved by Superior Court decree for failure to pay franchise tax. Prior to its incorporation, defendants Max Riffkind, Irving Riffkind and William Riffkind, were doing business as partners at 1925 South Kedzie Avenue, Chicago, owned and were operating machinery, equipment and motor trucks in conducting a milk and dairy business. These defendants were the original subscribers and stockholders of the Lincoln Dairy Company, and it is alleged that in obtaining the charter, they grossly overvalued the partnership assets which they turned in, in full payment of the capital stock of the corporation, at a valuation of $35,000. The value of the partnership assets did not exceed $7,500, which the Riffkinds then knew, but they reported to the state that all the capital stock was paid in full. This capital stock was divided into 250 shares of $100 each, and was

40020

PHILLIP BRAUNS,

(Plaintiff) Appellee,

vs.

LINCOLN DAIRY COMPANY, et al.,

(Defendants) Appellees.

APPEAL FROM

MADISON COUNTY

Opinion filed

MR. JUSTICE DUNN delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment entered May 20, 1926, sustaining motions to dismiss the amended complaint and dismissing the cause.

Phillip Brauns, plaintiff, who sued a judgment creditor, brought suit against the defendants. The defendants filed motions to strike the amended complaint, which motions were sustained and the case dismissed at plaintiff's costs.

The allegations of the amended complaint admitted by the motions to dismiss, are, in substance, that the Lincoln Dairy Company was incorporated February 24, 1922, and continued to operate under its charter in Chicago until June 16, 1924, when it was dissolved by chancery court decree for failure to pay franchise tax. Prior to its incorporation, defendants were stockholders, having subscribed and fulfilled subscriptions, were doing business as partners at 1000 South Ewing avenue, Chicago, owned and were operating machinery, equipment and motor trucks in conducting a milk and dairy business. These defendants were the original subscribers and stockholders of the Lincoln Dairy Company, and it is alleged that in obtaining the charter, they grossly overvalued the property assets which they turned in, in full payment of the capital stock of the corporation, at a valuation of $80,000. The value of the intangible assets did not exceed $7,000, which the officers knew were, but they reported to the state that all the capital stock was paid in full. This capital stock was divided into 250 shares of $100 each, and was

issued as follows: 120 shares each to Maxwell and Irving Riffkind and 10 shares to William Riffkind, They elected themselves directors and continued to operate the milk business under the corporate name from the same office as they had previously operated the business as co-partners. Following the dissolution decree of July 18, 1935, Maxwell, Irving and William Riffkind, together with Raymond Riffkind, continued to operate the same business in the name of Lincoln Dairy Company, as a corporation, from the same office and with the same equipment. Prior to the dissolution decree, they pretended to be the owners of the property and assets of the corporation, and attempted to place the property beyond the reach of creditors by mortgaging it for $1,316.10 to secure a pretended indebtedness which did not exist, and the note which the mortgage was given to secure was without consideration, and was for the purpose of protecting the property from the liens of creditors then and thereafter existing. While the defendants were operating the business as Lincoln Dairy Company, a corporation, they negligently operated and controlled one of the motor trucks then in their possession so as to inflict upon the plaintiff, Phillip Brenner, a personal injury, for which he instituted suit against the Lincoln Dairy Company, a corporation, and obtained service on said de facto corporation by serving Maxwell Riffkind, its president, and such de facto corporation, by its acting officers, Maxwell, Irving and William Riffkind, caused the appearance of Lincoln Dairy Company, a corporation, to be entered in Circuit Court Case No. 35C-17672 entitled Brenner v. Lincoln Dairy Company, and as a corporation the defendant filed an answer denying liability and thereby estopped said de facto corporation, and the members from denying that the defendant Lincoln Dairy Company, was at the time of the injury and at the time of the suit a corporation. A jury was called in the action and returned a verdict for $3,500 in favor of

issued as follows: 150 shares each to Maxwell and Irving Griffith and 15 shares to Julius Griffith. They elected themselves directors and continued to operate the milk business under the corporate name the same office as they had previously conducted the business as co-partners. Following the dissolution decree of July 12, 1920, Maxwell, Irving and Julius Griffith, requiring also payment existing contract to operate the same business in the name of Illinois Dairy Company, as a corporation, from the same office and with the same equipment. Prior to the dissolution decree, they purchased to be the owners of the property and assets of the partnership, and attempted to place the property beyond the reach of creditors by mortgaging in the Ill.Tr.Co to secure a pretended indebtedness which did not exist, and the note which the mortgage was given to secure was without consideration, and was for the purpose of protecting the property from the claims of creditors then and thereafter existing. While the defendants were operating the business as Illinois Dairy Company, a corporation, they negligently operated and maintained one of the motor trucks then in their possession so as to injure the plaintiff, Julius Brunner, a personal injury, for which he instituted suit against the Illinois Dairy Company, a corporation, and obtained service on said de facto corporation by serving Maxwell Griffith, its president, and such de facto corporation, by its acting officers, Maxwell, Irving and Julius Griffith, pursued the adversary of Illinois Dairy Company, a corporation, to an appeal in Circuit Court case No. 32C-1727 entitled Brunner v. Illinois Dairy Company, and as a corporation the defendant filed an answer denying liability and thereby estopped said de facto corporation, and the evidence tend denying that the defendant Illinois Dairy Company, was at the time of the injury and at the time of the suit a corporation. A jury was called in the action and returned a verdict for $2,500 in favor of

the plaintiff, which was entered on February 26, 1937.

On March 9, 1937, within 11 days after the entry of plaintiff's judgment, Maxwell Riffkind, Irving Riffkind and William Riffkind applied to the Secretary of State for a charter for the defendant Lincoln Milk Company. The defendants, William A. Romanek, Sol Matleen and Joseph Marshall, on behalf of the Riffkinds, became incorporators and agents for the Riffkinds, and pretended to pay for the capital stock; that the Lincoln Milk Company was a mere corporate shell or legal fiction used for transferring the property beyond the reach of execution; that the charter that was issued to the Lincoln Milk Company was not filed of record until May 11, 1937, more than 30 days after the receipt of the charter.

To defeat plaintiff's execution and place the property beyond the reach of creditors, and without consideration, the Riffkinds on May 12, 1937, executed a chattel mortgage to Rose Mendelson on the same dairy equipment mentioned in the previous mortgage to the First United Finance Corporation. The Rose Mendelson mortgage was to secure a bogus indebtedness of $1,500.

The property and assets of the Lincoln Dairy Company should be impressed with the constructive trust and subjected to plaintiff's judgment, with interest and costs; that the judgment remains unsatisfied, and an execution has been returned no property found, and there is now due the plaintiff $3,500 with interest at 5% from February 26, 1937, and reasonable allowance for attorney's fees.

There is a prayer for relief, and that the defendants be enjoined from transferring or encumbering any of their property or assets; and that the property of the defendants, and each of them, be subjected to a lien and execution to satisfy the plaintiff's judgment and costs.

The matter came up before the court on motion of the defendants to dismiss the amended complaint on the ground that the complaint wholly fails to set up any cause of action.

the plaintiff, which was entered on January 20, 1927.

On March 3, 1927, eight it was after the entry of plaintiff's judgment, Samuel Elkins, having filed the writ of attachment against the property of John Doe a garnishee for the defendant Lincoln Milk Company. The garnishee, Julius A. Hammond, got matters and lawful authority, on behalf of the defendant, because inspectors and agents for the plaintiff, not entitled to act for the original assets; that the plaintiff also obtained a writ of attachment and garnishment against the property beyond the reach of execution; that the property that was levied on the limits milk company was not fixed until on 11, 1927, more than 30 days after the receipt of the garnishee.

To defeat plaintiff's execution and place the property beyond the reach of creditors, and without consideration, the defendants on May 11, 1927, executed a chattel mortgage in face evidence on the same dairy equipment mentioned in the previous mortgage to the first United Illinois Corporation. The face consideration mortgage was to secure a debt in the amount of $1,000.

The property and assets of the Lincoln Dairy Company should be interpleaded with the garnishee trust and subjected to plaintiff's judgment, with interest and costs; that the judgment creditor contended, and in evidence has been returned no property found, and there is due the plaintiff $1,000 with interest at 6% from January 20, 1927, and reasonable allowance for attorney's fees.

There is a judgment for plaintiff, and that the garnishee be adjudged from transferring or encumbering any of their property or assets; and that the property of the garnishee, one week of time, be subjected to a lien and execution to satisfy the plaintiff's judgment and costs.

The matter came on before the court on motion of the garnishee to dismiss the interpleaded defendants on the ground that the complaint should fails to set up cause of action.

The question involved in this appeal is whether the court erred in striking plaintiff's amended complaint and in dismissing the cause on the ground that it did not allege facts that would justify the trial court in trying the issues.

By the motion to strike, the defendants admit the allegations that are well pleaded, and if from the allegations of fact and all favorable inference to be drawn therefrom the complaint fails to state a cause of action, the court would be justified in striking the amended complaint and, in a proper case, in dismissing the cause. However, in this case we are of the opinion that there are sufficient facts pleaded in the amended complaint to justify the court in overruling the motion of the defendant Dairy Company, and that this judgment was based upon the ground of damages sustained by the plaintiff because of negligence of the defendants in the operation of an automobile, From the record in that case it appears that the defendant Lincoln Dairy Company filed its appearance and pleadings and proceeded to trial upon the issues that were made upon the pleadings. The Lincoln Dairy Company, a corporation, as is stated in the pleadings, was in the dairy business, and continued to operate for a considerable time after the charter of this defendant was dissolved by the court for failure to pay the franchise tax, and the individual defendants named in the proceeding had possession of all the assets of this corporation and used these assets in the payment of stock in a new corporation, and also retained such as were not used by these individuals for the purpose of defeating the plaintiff in the collection of the judgment by an execution issued at that time.

It is further stated in the amended complaint that Max Riffkind, Irving Riffkind and William Riffkind, together with Raymond Riffkind, following the dissolution decree of July 18, 1935, continued to operate the same business in the name of the defendant Lincoln Dairy Company, as a corporation, from the same office and with the same equipment, and prior to the dissolution decree, these defendants

The question involved in this appeal is whether the court erred in sustaining plaintiff's amended complaint and in dismissing the cause on the ground that it did not allege facts that would justify the trial court in trying the issues.

By the motion to strike, the defendant admits the allegations that are well pleaded, and if from the allegations of fact and all favorable inference is to be drawn therefrom the complaint fails to state a cause of action, the court could be justified in striking the amended complaint and, in a proper case, in dismissing the cause. However, in this case we are of the opinion that there are sufficient facts pleaded in the amended complaint to justify the court in overruling the motion of the defendant dairy company, and that this judgment was based upon the grounds of damages sustained by the plaintiff because of negligence of the defendants in the operation of an automobile. From the record in this case it appears that the defendant Lincoln Dairy Company filed its appearance and pleadings and proceeded to trial upon the issues that were made upon the pleadings. The Lincoln Dairy Company, a corporation, as is stated in the pleadings, was in the dairy business, and continued to operate for a considerable time after the charter of this defendant was dissolved by the court for failure to pay the franchise tax, and the individual defendants named in the proceeding had possession of all the assets of this corporation and used these assets in the payment of stock in a new corporation, and also retained such as were not used by these individuals for the purpose of satisfying the plaintiff in the collection of the judgment by an execution issued at such time.

It is further alleged in the amended complaint that one Arthur Irving Gifford and William Gifford, together with Raymond Gifford, following the dissolution decree of July 18, 1920, continued to operate the same business in the name of the defendant Lincoln Dairy Company, as a corporation, from the same office and with the same equipment, and prior to the dissolution decree, these defendants

attempted to place the property beyond the reach of the creditors by mortgaging it for the amount mentioned in the two separate chattel mortgages, which the plaintiff alleges was but a pretended indebtedness and did not exist, and that the note which was given to evidence the amount of this mortgage was without consideration.

The sole question before the court is what has become of this property of the corporation. From the statement there seems to have been considerable property which was used by the Lincoln Dairy Company in the conduct of its business. The defendants answer, however, by stating facts that are not in the record. Many of the facts which would have had a proper place if submitted on the trial of the issues after the defendants had answered the amended complaint, will not be considered by us on this motion, for the reason, as we have stated, the amended bill of complaint is the only statement of facts we can consider, as we are controlled by the rules governing the motion to strike the amended bill of complaint.

It is necessary to call attention to only a few of these facts, as stated, to indicate that the defendants have attempted to offer a defense. They mention the condition under which this case was filed and the attorneys who were engaged in the trial of the matter, and that at the time due to pressing business conditions and some trouble occasioned by failure to comply with the ordinances of the Health Department, the premises were shut down and thereupon, Maxwell Riffkind, Raymond Riffkind and Irving Riffkind consulted with an attorney relative to incorporating a new corporation. But what that has to do in determining whether or not there were sufficient facts alleged in the amended complaint, we are at a loss to say. Then the defendants recite the organization of the Lincoln Milk Company, and that it did not receive any of the assets of the old company, etc.

We believe from what appears in the record that it will be well to have a trial of the cause and that there are sufficient

attempted to place the property beyond the reach of the creditors by mortgaging it for the sums mentioned in the two records involved mortgages, which the plaintiff alleges are but a pretended indebtedness and did not exist, and that the note which was given in evidence the amount of this mortgage was without consideration.

The sole question before the court is what has become of this property of the corporation. From the statement there seems to have been considerable property which was used by the Illinois dairy company in the conduct of its business. The defendants answer, however, by stating facts that are not in the record. Many of the items which would have had a proper claim if submitted on the trial of the issues after the defendants had answered the complaint, will not be considered by us on this motion, for the reason, as we have stated, the amended bill of complaint is the only statement of facts we can consider, as we are controlled by the rules governing the motion to strike the amended bill of complaint.

It is necessary to call attention to only a few of these items, as stated, to indicate that the accounts were changed to offset a defense. They mention the condition under which this case was filed and the attorneys who were engaged in the trial of the matter, and that it is due to pressing business conditions and some trouble occasioned by failure to comply with the ordinances of the health department, the premises were shut down and thereupon, Maxwell filed, Upond filing bill filing counsel with an attorney relative to incorporating a new corporation. But what that has to do in determining whether or not there were sufficient funds alleged in the amended complaint, we are at a loss to say. Then the defendants recite the organization of the Illinois Milk Company, but that it did not receive any of the assets of the old company, etc.

In briefs two such reports in our record that is will be well to have a total of the bonds and that taxes are sufficient

facts in the record to justify a trial upon the defendants' filing an answer.

The court's order striking the amended bill of complaint is reversed and the cause is remanded with directions that the defendants file an answer, and in due course that the court hear the matter on its merits.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. CONCURS,
BURKE, J. TAKES NO PART.

there is the power to justify a total ban on defendants' filing an answer.

The court's order striking the answers will of necessity be reversed and the cause be remanded with instructions that the defendants file an answer, and in the motion that the court grant the respondent on its merits.

ATTORNEYS FOR PLAINTIFFS.

MESSRS. E. SCHLITZ, P.J. BRUNING,
BURKE, J. TIGHT DO [illegible].

40397

COLLATERAL FINANCE CO., Not Inc., (Plaintiff) Appellant,

v.

SAM BERMAN and SADIE BERMAN, (Defendants) Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

300 I.A. 606

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago vacating and opening a judgment by confession, and upon a hearing rendering judgment in favor of the defendants.

On January 11, 1937, the plaintiff, Collateral Finance Co., Not Inc., obtained a judgment by confession in the Municipal Court of Chicago on 26 judgment notes executed by the defendants, Sam Berman and Sadie Berman, for the sum of $7,747.00 and costs. Execution was returned nulla bona and garnishment proceedings were commenced against Eckhart Park Furniture Company as garnishee, and on February 9, 1937, the garnishee filed an answer "no funds". The defendants' answer was contested by the plaintiff and on April 2, 1937, after a hearing, the court entered an order that the garnishee is indebted to the defendant, Sam Berman in the sum of $59.40, and entered a judgment against the garnishee for said sum. Subsequently the judgment against the garnishee was satisfied.

Thereafter on April 14, 1937, an alias writ of execution was issued against the defendants on said judgment for $7,747.00 and costs. This alias execution was duly served on the defendant Sadie Berman on April 15, 1937. On April 24, 1937, a petition for citation to discover assets was filed against the defendants, and on the same date citation summons were issued and placed in the hands of the bailiff of the Municipal Court, who served said citation summons on the defendants in this action.

COLLATERAL FINANCE CO., INC.,
(Plaintiff) Appellant,

v.

MAX BERMAN and SADIE BERMAN,
(Defendants) Appellees.

APPEAL FROM
Municipal Court
of Chicago.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order of the Municipal Court of Chicago vacating and opening a judgment by confession, and upon a hearing rendering judgment in favor of the defendants.

On January 11, 1927, the plaintiff, Collateral Finance Co., Inc., obtained a judgment by confession in the Municipal Court of Chicago on 24 judgment notes executed by the defendants, Max Berman and Sadie Berman, for the sum of $7,747.00 and costs. Execution was returned nulla bona and garnishment proceedings were commenced against Kobart Brk furniture Company as garnishee, and on February 8, 1927, the garnishee filed an answer "no funds". The defendants' answer was contested by the plaintiff and on April 8, 1927, after a hearing, the court entered an order that the garnishee is indebted to the defendant, Max Berman in the sum of $59.40, and entered a judgment against the garnishee for said sum. Subsequently the judgment against the garnishee was satisfied.

Thereafter on April 14, 1927, an alias writ of execution was issued against the defendants on said judgment for $7,747.00 and costs. This alias execution was duly served on the defendant Sadie Berman on April 15, 1927. On April 24, 1927, a petition for citation to discover assets was filed against the defendants, and on the same day citation summons were issued and placed in the hands of the bailiff of the municipal court, who served said citation summons on the defendants in this action.

The defendants failed to appear on May 6, 1937, in response to said citation summons, and a rule to show cause was issued against them, returnable May 17, 1937. On May 11, 1937, each of the defendants was personally served with a certified transcript of the rule to show cause, and each of them was examined in open court and an order was entered discharging the rule to show cause and dismissing the citation against them.

Then, on January 12, 1938, another garnishment action was instituted against Eckhart Park Furniture Company on said judgment. Subsequently, this garnishee filed a sworn answer alleging no funds and stating "inter alia" "that Sam Berman has been and is now a married man, the head of a family and resides with same in the City of Chicago, and is therefore entitled to exemption of $20.00 per week under the laws of the State of Illinois." Meanwhile a creditors' bill predicated on said judgment had been filed in the Superior Court of Cook County and proceedings had therein.

On March 1, 1938, a motion was filed by the defendants to vacate and set aside said judgment of January 11, 1937, upon the sole ground "that the Collateral Finance Co., Not Inc., not being a legal entity, said judgment is void for lack of jurisdiction." To this motion the plaintiff filed an answer alleging, among other facts, that a creditors' bill was filed in the Superior Court of Cook County based upon the judgment; that both defendants had filed their pleas; that the defendants made a motion before the court, to whom the creditors' bill was assigned, to have the creditors' bill dismissed on the ground that the judgment upon which it was predicated was not a legal entity, which was the same ground on which this motion was denied by the court. This case was transferred in the Municipal Court by reassignment to Judge McGarry. The defendants, by leave of court, filed a petition to vacate and set aside the judgment of

The defendants failed to appear on May 6, 1927, in response to said citation summons, and a rule to show cause was issued against them, returnable May 17, 1927. On May 11, 1927, each of the defendants was personally served with a certified transcript of the rule to show cause, and each of them was present in open court and an order was entered discharging the rule to show cause and dismissing the citation against them.

Then, on January 12, 1928, another garnishment action was instituted against Herbert Park Furniture Company on said judgment. Subsequently, this garnishee filed a sworn answer alleging no funds and stating inter alia "that the person has been on is now a married man, the head of a family and resides with same in the City of Chicago, and is therefore entitled to exemption of $25.00 per week under the laws of the State of Illinois." Meanwhile a creditors' bill predicated on said judgment had been filed in the Superior Court of Cook County and proceedings had therein.

On March 1, 1928, a motion was filed by the defendants to vacate and set aside said judgment of January 11, 1927, upon the sole ground "that the collateral finance co., not Inc., not being a legal entity, said judgment is void for lack of jurisdiction." To this motion the plaintiff filed an answer alleging, among other facts, that a creditors' bill was filed in the Superior Court of Cook County based upon the judgment; that such defendants had filed their plea; that the defendants made a motion before the court, to stay the creditors' bill and assumed, to have the creditors' bill dismissed on the ground that the judgment upon which it was predicated was not a legal entity, which was the same ground on which this motion was denied by the court. This case was transferred in the municipal Court by reassignment to Judge McCarthy. The defendants, by leave of court, filed a petition to vacate and set aside the judgment of

January 11, 1937. In an amended petition it is stated by the defendants that the judgment was void because the plaintiff, Collateral Finance Co., Not Inc., was not a legal entity. This petition further set up as a further defense an alleged oral agreement between Ben Kavin, a former owner of the notes herein, and Margaret Simon, to cancel said notes, and that the plaintiff acquired the notes with the knowledge of this agreement, and therefore the defendants are not liable to the plaintiff on the notes.

On March 25, 1938, the court entered an order opening the judgment, allowing the amended petition to stand as an affidavit of merits, and setting the case for trial. The court also entered an order granting leave to the plaintiff to amend its complaint to read, "M. Hatowski and D. Hattis DBA. Collateral Finance Co., Not Inc., a co-partnership". After several continuances the cause came up for trial upon the pleadings as amended by both parties, and after a trial upon the issues thus presented, the Municipal Court entered its finding against the plaintiff and in favor of the defendants, and ordered the judgment by confession vacated and set aside, and that the plaintiff take nothing by the suit.

The plaintiff was given leave by the court to amend the name of the plaintiff in the above entitled cause to read M. Hatowski and O. Hattis DBA Collateral Finance Co., Not Inc., a co-partnership, and the defendants were granted leave to file and did file on March 25, 1938, an amended petition to vacate and set aside the judgment by confession entered on January 11, 1937. Upon the filing of the motion the court entered an order that the judgment be opened; that leave be and is given to the defendants to appear and make defense herein, and that a trial of this cause be had notwithstanding the judgment, and that the judgment stand as security until the further order of the court.

January 11, 1927. In an amended petition it is alleged by the defendants that the judgment was void because the plaintiff, Collateral Finance Co., Ltd. Inc., was not a legal entity. This petition further alleges as a further defense an alleged oral agreement between Lewis, a former owner of the notes herein, and Rodgers Hanes, to cancel said notes, and that the plaintiff acquired the notes with the knowledge of this agreement, and therefore the defendants are not liable to the plaintiff on the notes.

On March 25, 1927, the court entered an order opening the judgment, allowing the amended petition to stand as an affidavit of merits, and setting the case for trial. The court also entered an order granting leave to the plaintiff to amend its complaint to read, "R. Rotowski and G. Davis DBA. Collateral Finance Co., Ltd. Inc., a co-partnership". After several continuances the cause came up for trial upon the pleadings as amended by both parties, and after a trial upon the issues thus presented, the municipal court entered its finding against the plaintiff and in favor of the defendants, and entered the judgment by confession vacated and set aside, and that the plaintiff take nothing by the suit.

The plaintiff was given leave by the court to amend the name of the plaintiff in the above entitled cause to read R. Rotowski and G. Davis DBA Collateral Finance Co., Ltd Inc., a co-partnership, and the defendants were granted leave to file and did file on March 28, 1928, an amended petition to vacate and set aside the judgment by confession entered on January 11, 1927. Upon the filing of the motion the court entered an order that the judgment be opened; that leave is and is given to the defendants to appear and make defense herein, and that a trial of this cause be had notwithstanding the judgment, and that the judgment stand as security until the further order of the court.

Defendants' amended petition to vacate and set aside the judgment by confession is in part as follows: That one, Myer J. Hatowski and one, D. Hattis, now claim or pretend to be co-partners, doing business as Collateral Finance Co., Not Inc., and now claim or pretend to be the legal owners or holders of said notes; that these defendants charge that Myer J. Hatowski and D. Hattis acquired the promissory notes after their maturity with full knowledge of the agreement aforesaid, as described in Paragraph 4. In Paragraph 4 the defendants charge that on, to-wit, the 16th day of May, A. D. 1936, an oral agreement was entered into by and between one, Ben Kavin, the then owner of the promissory notes, and Margaret Simon, whereby Margaret Simon agreed to and did pay to Ben Kavin $500 cash, and in consideration therefor Ben Kavin promised and agreed to procure a release of the junior mortgage and to cancel all of the promissory notes then unpaid and to release the defendants from any and all liability thereon, and to surrender said cancelled notes to these defendants; that said agreement further provided that one, Fred Prochep, the then owner of the premises aforesaid, was to execute a quit-claim deed releasing all his right, title and interest in and to said premises to the said Margaret Simon in consideration of the payment to him by the said Margaret Simon, or her agents, of the sum of $350; that pursuant to said agreement, Fred Prochep duly executed said quit-claim deed and received the aforesaid sum therefor; that the said Ben Kavin, pursuant to said agreement, did procure from the said Phillip L. Freed, trustee, a release of said junior mortgage; that he, Ben Kavin, fraudulently failed to cancel said promissory notes then outstanding and unpaid and to release the defendants herein from liability thereon and to surrender the notes to the defendants herein; that instead of cancelling the same and releasing the defendants from liability and surrendering said notes to them, as

Defendants' amended petition in vacate and set aside the judgment by confession in in part as follows: That one, Ayer d. Hotswell and one, G. Morris, her claim or pretend to be co-partners, doing business as Collateral Finance Co., Not Inc., and for claim or pretend to be the legal owners or holders of said notes; that these defendants change that Ayer d. Hotswell and G. Morris acquired the promissory notes after their maturity with full knowledge of the agreement aforesaid, as described in Paragraph 4. In Paragraph 4 the defendants charge that on, to-wit,the 14th day of May, A. D. 1928, an oral agreement was entered into by and between one, Dan Levin, the then owner of the promissory notes, and Edward Hamm, whereby Edward Hamm agreed to and did pay to Dan Levin $300 cash, and in consideration thereof Dan Levin promised and agreed to produce a release of the junior mortgage and to cancel all of the promissory notes then unpaid and to release the defendants from any and all liability thereon, and to surrender said cancelled notes to these defendants; that said agreement further provided that one, Fred Fromhop, the then owner of the premises aforesaid, was to execute a quit-claim deed relinquishing all his right, title and interest in and to said premises to the said mortgagee Hamm in consideration of the payment to him by the said mortgagee Hamm, or her agents, of the sum of $350; that pursuant to said agreement, Fred Fromhop duly executed said quit-claim deed and received the aforesaid sum therefor; that the said Dan Levin, pursuant to said agreement, did procure from the said Phillip L. Frank, trustee, a release of said junior mortgage; that he, Dan Levin, fraudulently failed to cancel said promissory notes than outstanding and unpaid and to release the defendants herein from liability thereon and to surrender the notes to the defendants herein; that instead of cancelling the same and releasing the defendants from liability and surrendering said notes to them, he

by him agreed, he transferred said promissory notes to some person or persons whose identity is unknown to these defendants.

It is to be noted that in this proceeding the plaintiff did not offer any objection as to the filing by the defendants of the amended petition to vacate the judgment, or offer any objection to any of the proceeding had by the court upon the hearing of the issues based upon the pleadings, or even objected to the entry of the judgment.

From a further consideration of the record it appears that the plaintiff not only took an active part in the conduct of the trial, but even obtained leave to amend the name of the plaintiff, as we have outlined in this opinion. In Lox, et al. v. Bradley, 179 Ill. App. 1, this court held that the plaintiffs waived the jurisdictional question by going to trial without objection, and said:

> "Whether the order opening the judgment and giving the defendants leave to make a defense and have a trial of the cause was, or was not, proper on the petition, it is not necessary to decide. After the judgment was opened the plaintiffs appeared, took part in the trial and moved for a new trial. They thereby waived their right to except to the order. After the cause was so opened, the plaintiffs should not have appeared at all, or at most, should have confined themselves to the resistance of any action proposed by the defendant. Grand Pacific Hotel Co. v. Pinkerton, 317 Ill. 61. Herrington v. McCollum, 73 Ill. 476; Wilson v. Chandler, 133 Ill. App. 622.
>
> The objection to the jurisdiction, it was said in Schafer v. Moe, 72 Ill. App. 50, 'must be persisted in and solely relied on, in order to be available.'"

As we have indicated, it was upon the pleadings as amended by both sides that the trial of the cause proceeded, and evidence and arguments were heard without objection by either side. In National Lead Co. v. Mortell, 261 Ill. App. 332, wherein the jurisdiction of the trial court to vacate a default judgment was in issue, the Appellate Court said:

> "Moreover, the plaintiff waived the question by participating in the trial. The pleadings were settled under an order of court approved by all the parties to the proceeding."

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by him signed, he transferred all promissory notes to some person or persons whose identity is unknown to these defendants.

It is to be noted that in this proceeding the plaintiff did not offer any objection as to the filing by the defendants of the amended petition to vacate the judgment, or offer any objection to any of the proceeding had by the court upon the hearing of the issues based upon the pleadings, or even objected to the entry of the judgment.

From a further consideration of the record it appears that the plaintiff not only took an active part in the conduct of the trial, but even obtained leave to amend the name of the plaintiff, as we have outlined in this opinion. In Lux, et al. v. Hughes, 172 Ill. App. 1, this court held that the plaintiffs waived the jurisdictional question by going to trial without objection, and said:

> "Whether the order opening the judgment and giving the defendants leave to make a defense and have a trial of the issue vs. or not, proper on the pleadings, it is not necessary to decide. After the judgment was opened the plaintiffs appeared, took part in the trial and moved for a new trial. They thereby waived their right to except to the order. After the cause was so opened, the plaintiffs should not have appeared at all, or at most, should have confined themselves to the realities of any motion proposed by the defendant. Grand Pacific Hotel Co. v. Finnerty, 217 Ill. 82. Harrington v. Moulton, 73 Ill. 476; Wilson v. Kelly, 156 Ill. 199, 204."

The objection to the jurisdiction, it was said in Kohler v. Moe, 72 Ill. App. 80, "must be presented in and solely relied on, in order to be available."

As we have indicated, it was upon the pleadings as amended by both sides that the trial of the cause proceeded, and evidence and arguments were heard without objection by either side. In National Land Co. v. Portell, 221 Ill. App. 172, wherein the jurisdiction of the trial court to vacate a default judgment was in issue, the Appellate Court said:

> "Moreover, the plaintiff waived the question by participating in the trial. The pleadings were amended under an order of court approved by all the parties to the proceeding."

It appears from the final order entered by the court that evidence was heard upon the issues presented and the court entered the final order as outlined by this court in its opinion, so that in view of the fact that the evidence is not preserved and is not a part of the record, we may assume that there was sufficient evidence to justify the court in entering the order in this case.

The plaintiff made the further suggestion that the defendants were not parties to the oral agreement set forth in the amended petition. The defendants' answer to this is that the agreement set forth that Ben Kavin fraudulently failed to carry out his promise, and instead, negotiated the notes in question, and that the plaintiffs Hatowski and Hattis, knew of this agreement when they acquired the notes without consideration and after maturity, and in view of the fact that the plaintiff did not object to the sufficiency of the defense upon the trial, it must therefore be held to have waived its right to object at this time. Upon the question of objection to the sufficiency of the amended petition, Rule 104 of the Revised Civil Practice Rules of the Municipal Court of Chicago, in force November, 1935, provides in part as follows:

> "No new trial shall be granted or any judgment vacated or set aside after a trial and a finding by the court, or a verdict of a jury, on the ground of any insufficiency in law of any pleading unless the same discloses no reasonable cause of action or defense and it is apparent that no legitimate amendment can make it good and it further appears that prior to the trial such insufficiency in law was brought before the court for its consideration by motion as hereinbefore provided. * * *"

Note 1, appended to said Rule, provides in part as follows:

> "If parties see fit to go to trial with defective pleadings, which could be made good by amendments if the defects were pointed out, they should be bound by the result of the trial unless the evidence is preserved by a report of the proceedings and is not sufficient to support the judgment."

And again, Sec. 42, Par. (3), Ch. 110, Illinois St. Bar Stats. provides:

It appears from the final order entered by the court that evidence was heard upon the issues presented and the court entered the final order as outlined by this court in its opinion, so that in view of the fact that the evidence is not preserved and is not a part of the record, we may assume that there was sufficient evidence to justify the court in entering the order in this case.

The plaintiff makes the further suggestion that the defendants were not parties to the oral agreement set forth in the amended petition. The defendants' answer to this is that the agreement set forth that Ben Levin fraudulently failed to carry out his promise, and instead, negotiated the notes in question, and that the plaintiffs Hotowski and Hirth, knew of this agreement when they received the notes without consideration and after maturity, and in view of the fact that the plaintiff did not object to the sufficiency of the defense upon the trial, it must therefore be held to have waived its right to object at this time. Upon the question of objection to the sufficiency of the amended petition, Rule 104 of the "revised civil practice rules of the Municipal Court of Chicago, 1f force December, 1925, provides in part as follows:

> "No new trial shall be granted or any judgment vacated or set aside after a trial and a finding by the court, or a verdict of a jury, on the ground of any insufficiency in law of any pleading unless the same discloses no reasonable cause of action or defense and it is apparent that no legitimate amendment can make it good and it further appears that prior to the trial such insufficiency in law was brought before the court for its consideration by motion or pretrial memorandum." * * *"

Rule 1, amended to said rule, provides in part as follows:

> "If parties are ready to go to trial with defective pleadings which could be made good by amendments if the defects were pointed out, they should be bound by the result of the trial unless the evidence is preserved by a record of the proceedings and is not sufficient to support the judgment."

and again, Sec. 44, par. (3), Ch. 110, Illinois Stat. Ann. provides:

"All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

And in passing upon a like question this court in Carson-Payson Co. v. Peoria Terrazzo Co., 288 Ill. App. 583, said:

"Conceding that the complaint in the instant case was defective in that there was no allegation to the effect that appellant was free from contributory negligence, that defect was not objected to in the trial court and under the provisions of section 42 of the Civil Practice Act, which provides that all defects in pleadings, formal or substantial, not objected to in the trial court are waived, the sufficiency of this complaint cannot, for the first time, be challenged in this court."

So, the plaintiff having failed to raise the question of sufficiency of the amended petition filed by the defendant, it is now barred to question the pleadings as it attempts to do in its brief.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

"All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

And in passing upon a like question this court in Intermountain Co.

v. Harris Farmers Co., 320 Ill. App. 382, said:

"Conceding that the complaint in the instant case was defective in that there was no allegation to the effect that negligence was first from contributory negligence, this defect was not objected to in the trial court and under the provisions of section 40 of the Civil Practice Act, which provides that all defects in pleadings, formal or substantial, not objected to in the trial court are waived, the sufficiency of this complaint cannot, for the first time, be challenged in this court."

So, the plaintiff having failed to raise the question of sufficiency of the amended petition filed by the defendant, it is too barred to question the pleadings as it attempts to do in its brief.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

STONE P. J., MCGIVERN, P.J. AND BURKE, J., CONCUR.

40488

SARAH F. PETERSON and CHARLES A. PETERSON, (Plaintiffs) Appellees, v. ANDREW CLARK, doing business as A. CLARK TRANSPORT COMPANY, (Defendant) Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY. 300 I.A. 606

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Andrew Clark, doing business as A. Clark Transport Company, from a judgment entered by the court for the plaintiff, Sarah F. Peterson, and against the defendant for $5,000. The suit was for personal injuries sustained by the plaintiff in an automobile collision which occurred January 20, 1937, at the intersection of Route U. S. 30, the Lincoln Highway, and Route U. S. 45. The location of this intersection was near the town of Frankfort, Illinois, and about 20 miles from Joliet, Illinois. The jury found the defendant not guilty as to the co-plaintiff, Charles A. Peterson.

The complaint consists of three counts, the first charged that on the 20th of January, 1937, the defendant was in possession and control of an automobile truck with a trailer attached, that the defendant by its agent and servant was operating said automobile truck and trailer in an easterly direction along and upon Route U. S. 30, commonly known as the Lincoln Highway; that Charles A. Peterson was operating an automobile in a southerly direction along Route U. S. 45 and at the intersection of Route 30, the Lincoln Highway, that the plaintiff, Sarah F. Peterson, was riding in the automobile with him; that both plaintiffs, Charles A. Peterson and Sarah F. Peterson, were in the exercise of ordinary care for their own safety; that the defendant through his agent and servant carelessly and negligently

SARAH F. PETERSON and CHARLES A. PETERSON,

(Plaintiffs) Appellees,

v.

AMMONS SLATT, doing business as A. SLATT TRANSPORT COMPANY,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

DUPAGE COUNTY.

Mr. JUSTICE WEBB DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Ammons Slatt, doing business as A. Slatt Transport Company, from a judgment entered by the court for the plaintiff, Sarah F. Peterson, and against the defendant for $2,000. The suit was for personal injuries sustained by the plaintiff in an automobile collision which occurred January 20, 1937, at the intersection of Route U. S. 30, the Lincoln Highway, and Route U. S. 45. The location of this intersection was near the town of Franklin, Illinois, and about 20 miles from Joliet, Illinois. The jury found the defendant not guilty as to the co-plaintiff, Charles A. Peterson.

The complaint consists of three counts, the first charged that on the 20th of January, 1937, the defendant was in possession and control of an automobile truck with a trailer attached, that the defendant by its agent and servant was operating said automobile truck and trailer in an easterly direction along and upon Route U. S. 30, commonly known as the Lincoln Highway; that Charles A. Peterson was operating an automobile in a southerly direction along Route U. S. 45 and at the intersection of Route 30, the Lincoln Highway, that the plaintiff, Sarah F. Peterson, was riding in the automobile with him; that both plaintiffs, Charles A. Peterson and Sarah F. Peterson, were in the exercise of ordinary care for their own safety; that the defendant through his agent and servant carelessly and negligently

operated and propelled an automobile truck and trailer so that by and through the negligence of the defendant the collision occurred between the truck and trailer and the automobile in which the plaintiff was riding whereby the plaintiff sustained the injuries complained of in the third count.

The second count contained a charge that the defendant by his servant and agent then and there so wilfully and wantonly propelled and operated the truck and trailer that by and through the wilful and wanton conduct of the defendant the collision occurred and the plaintiff sustained the injuries complained of in the third count.

The third count charged as negligence on the part of the defendant violation by the defendant of a statute of the State of Illinois providing that during the period from sunset to sunrise every motorist shall carry two lighted lamps showing white lights or lights of a yellow or amber tint visible at least 500 feet in the direction in which the motor vehicle is proceeding and also one lighted lamp which shall be so situated as to throw a red light visible for at least 500 feet in the reverse direction; that the defendant was in violation of this statute, and that the plaintiff, Sarah F. Peterson, was injured in a collision between the two automobiles as a result of which she sustained injuries.

The defendant, Andrew Clark, answered admitting the ownership and control of the automobile truck and trailer in question, denied that the plaintiffs were in the exercise of due care and caution and denied that the defendant was guilty of any of the acts of negligence and wilful misconduct charged against him.

Further the defendant answering alleged that the plaintiffs, Sarah F. Peterson and Charles A. Peterson, at the time and place in question were guilty of wilful and wanton conduct, and that such conduct on their part contributed as a proximate cause of the accident and injury without which the same would not have occurred. It is further

operated and propelled an automobile truck and trailer so that by and through the negligence of the defendant the collision occurred between the truck and trailer and the automobile in which the plaintiff was riding whereby the plaintiff sustained the injuries complained of in the third count.

The second count contained a charge that the defendant by his servant and agent then and there so wilfully and wantonly propelled and operated the truck and trailer that by and through the wilful and wanton conduct of the defendant the collision occurred and the plaintiff sustained the injuries complained of in the third count.

The third count charged an negligence on the part of the defendant violation by the defendant of a statute of the state of Illinois providing in part during the period from sunset to sunrise every motorist shall carry two lighted lamps showing white lights or lights of a yellow or amber tint visible at least 500 feet in the direction in which the motor vehicle is proceeding and also one lighted lamp which shall be so situated as to throw a red light visible for at least 500 feet in the reverse direction; that the defendant was in violation of this statute, and that the plaintiff, Sarah V. Peterson, was injured in a collision between the two automobiles as a result of which she sustained injuries.

The defendant, entire firm, answered admitting the ownership and control of the automobile truck and trailer in question, denied that the plaintiffs were in the exercise of due care and caution and denied that the defendant was guilty of any of the acts of negligence and wilful misconduct charged against him.

Further the defendant answering alleged that the plaintiffs, Sarah V. Peterson and Charles A. Peterson, at the time and place in question were guilty of wilful and wanton conduct, and that such conduct on their part contributed as a proximate cause of the accident and injury without which the same would not have occurred. It is further

alleged that by reason of the plaintiffs' wilful, wanton and reckless conduct they thereby contributed as a proximate cause of the accident and injury without which the same would not have occurred.

Prior to the trial, plaintiff's counsel filed of record an affidavit wherein plaintiffs' counsel stated that he was informed that Andrew Clark, the defendant, was insured against liability for injuries by the Associated Indemnity Corporation, which was a company engaged in the business of writing automobile liability insurance; that the company had an office located at 166 W. Van Buren Street, Chicago, Illinois; that that corporation was a stock company paying dividends to stockholders and policyholders; that the insurance company had made an investigation into this cause of action and employed the firm of Robertson, Crowe and Spence, attorneys of record, to defend the case; and that the insurance company is interested in the result of the suit and liable to pay part or all of any judgments, if any.

From the evidence it appears that Andrew Clark, defendant, was engaged in the business of transporting automobiles from Detroit, Michigan, and on the day of the accident, January 20, 1937, one of his trucks with a trailer attached was being operated by his employee Charles F. Beebe. Beebe had been to Cedar Rapids, Iowa delivering a load and was returning with the empty truck and trailer to Detroit. Beebe had had spark trouble, the truck had a governor on it which it is claimed made it impossible to drive it at a speed in excess of 40 miles an hour; Beebe got onto the Lincoln Highway, U. S. 30 and was eastbound. The Lincoln Highway at this point is a four-lane concrete through highway. On other highways intersecting the Lincoln Highway there were signs erected requiring motorists coming up to and before crossing the Lincoln Highway to come to a stop. There were such signs on both sides of the Lincoln Highway on Route 45 at the intersection where the accident occurred. The accident happened about 4:00o'clock

alleged that by reason of the plaintiff's willful, wanton and reckless conduct they thereby contributed as a proximate cause of the accident and injury without which the same would not have occurred.

Prior to the trial, plaintiff's counsel filed of record an affidavit wherein plaintiff's counsel stated that he was informed that Andrew Clark, the defendant, was insured against liability for injuries by the Associated Indemnity Corporation, which was a company engaged in the business of writing automobile liability insurance; that the company had an office located at 100 S. Ten Mile Street, Chicago, Illinois; that that corporation was a stock company paying dividends to stockholders and policyholders; that the insurance company had made an investigation into this cause of action and employed the firm of Robertson, Crow and Spence, attorneys of record, to defend the case; and that the insurance company is interested in the result of the suit and liable to pay part or all of any judgment, if any.

From the evidence it appears that Andrew Clark, defendant, was engaged in the business of transporting automobiles from Detroit, Michigan, and on the day of the accident, January 20, 1937, one of his trucks with a trailer attached was being operated by his employee Charles F. Beebe. Beebe had been to Cedar Rapids, Iowa delivering a load and was returning with the empty truck and trailer to Detroit. Beebe had had spark trouble, the truck had a governor on it which it claimed made it impossible to drive it at a speed in excess of 40 miles an hour; Beebe got onto the Lincoln Highway, U. S. 30 and was eastbound. The Lincoln Highway at this point is a four-lane boulevard through Highway. On other highways intersecting the Lincoln Highway there were signs erected requiring motorists coming up to and before crossing the Lincoln Highway to come to a stop. There were such signs on both sides of the Lincoln Highway on Route 40 at the intersection where the accident occurred. The accident happened about 6:30 o'clock

in the afternoon. It had been raining and at the time of the accident it was misty and cloudy. Beebe was proceeding east on the right-hand or south lane of Route 30 and proceeding up to the intersection of Route 45.

The plaintiffs, Charles A. Peterson and Sarah F. Peterson, his wife, lived in Battle Creek, Michigan and were on their way to California. They left at 6:00 o'clock in the morning of the day of the accident, Mr. Peterson driving a Studebaker two-door automobile. It had rained most of the day. Through error the Petersons went to Kankakee, Illinois, lost their way had turned back and before the occurrence of the accident were southbound on U. S. 45, coming up to the intersection of Route 30, the Lincoln Highway. The car in which the Petersons were riding and the truck and trailer outfit of the defendant both crossed into the intersection where they collided, as a result of which the plaintiff, Sarah F. Peterson, sustained injuries.

The defendant contends in regard to the accident that the plaintiff, Sarah F. Peterson, failed to prove that before and at the time of the accident in question she was in the exercise of due care and caution for her own safety, and that the trial court should have directed a verdict for the defendant.

The defendant points to the evidence offered by the plaintiff, which consisted of three disinterested witnesses, in addition to which the plaintiff and her husband also testified. Both the plaintiff and her husband at the time of the accident were 69 years of age. On the day of the accident they started from their home in Battle Creek, Michigan, for an automobile trip to California. Mr. Peterson was driving in the left front seat, and his wife, the plaintiff, was sitting beside him. On the back seat and on the floor was their baggage. They were traveling south in the country on a concrete

in the afternoon. It had been raining and at the time of the accident it was misty and cloudy. Wade was proceeding east on the right-hand or south lane of Route 30 and proceeding on in the intersection of Route 45.

The plaintiff, Darline I. Peterson and Jerry F. Peterson, his wife, lived in Battle Creek, Michigan and were on their way to California. They left at 6:00 o'clock in the morning of the day of the accident, Mr. Peterson driving a Studebaker two-door automobile. It had rained most of the day. Through error the Peterson went to Kankakee, Illinois, last their way had turned back and before the occurrence of the accident were southbound on U. S. 45, coming up to the intersection of Route 30, the Lincoln Highway. The car in which the Petersons were riding was the truck and trailer outfit of the defendant both crossed into the intersection where they collided, as a result of which the plaintiff, Jerry F. Peterson, sustained injuries.

The defendant contends in regard to the accident that the plaintiff, Jerry I. Peterson, failed to prove that before and at the time of the accident in question she was in the exercise of due care and caution for her own safety, and that the trial court should have directed a verdict for the defendant.

The defendant points to the evidence offered by the plaintiff, which consisted of three disinterested witnesses, in addition to which the plaintiff and her husband also testified. Both the plaintiff and her husband at the time of the accident were 22 years of age. On the day of the accident they started from their home in Battle Creek, Michigan, for an automobile trip to California. Mr. Peterson was driving in the left front seat, and his wife, the plaintiff, was sitting beside him. On the back seat and on the floor was their baggage. They were travelling south in the country on a concrete

highway known as Route 45 and at the time of the occurrence of the accident were crossing a four-lane through route highway No. 30 and known as the Lincoln Highway.

A witness for the plaintiffs named John Kahn, testified that he was not acquainted with any of the parties in the case, that with his son-in-law, Eugene Boucher, he had been in Chicago and was returning to his home in Peotone, Illinois; that the weather that afternoon was foggy and rainy; that at times one could see 100 feet, then 200 feet; that the pavements were wet and that he had the lights on his automobile. Kahn first saw the plaintiffs' Studebaker automobile on Route 45; that it was going about 20 miles an hour and that he caught up to it and passed it. At the northwest corner of Route 30 and 45 was Larson's oil station. The building itself was 100 feet west of Route 45. The gasoline pumps in front of the building were 12 to 15 feet from the north side of the pavement of Route 30, the Lincoln Highway. Kahn noticed that the back of the plaintiffs' automobile was packed with boxes, clothing, etc. Kahn stopped ten or fifteen feet from the north line of Route 30; that the Petersons drove up behind him and stopped. Kahn turned off to the right into Larson's gas station to get gasoline. At that time a transfer truck was coming from the west on Route 30, the Lincoln Highway; that he first noticed it when it was 100 to 200 feet away; that it was a wet, foggy and slippery day and that the truck was going much faster than he drove. Kahn testified that perhaps he was not a fair judge of the speed of automobiles but he thought it was going between 50 and 60 miles an hour. He saw it going by and heard a crash and then looked up. He did not see the actual crash. After the crash Kahn saw the transfer truck stop at the southeast corner of the pavement, saw the plaintiffs' Studebaker car go on to the southeast and against the gasoline station on the southeast corner. Kahn testified that

highway known as route 45 and at the time of the occurrence of the accident were crossing a four-lane through route highway No. 30 and known as the Lincoln Highway.

A witness for the plaintiffs named John John, testified that he was not acquainted with any of the parties in the case, that with his son-in-law, Eugene Roecker, he had been in Chicago and was returning to his home in Geneva, Illinois; that the weather that afternoon was foggy and rainy; that at times one could see 100 feet, then 50 feet; that the pavements were wet and that he had the lights on his automobile. John first saw the plaintiffs' Studebaker automobile on Route 45; that it was going about 50 miles an hour and that he caught up to it and passed it. At the northwest corner of Route 30 and 45 one Larson's oil station. The building itself was 100 feet west of Route 45. The gasoline pumps in front of the building were 12 to 15 feet from the north side of the pavement of Route 30 the Lincoln Highway. John noticed that the back of the plaintiffs' automobile was packed with boxes, clothing, etc. John stopped ten or fifteen feet from the north line of Route 30; that the defendant drove up behind him and stopped. John turned off to the right into Larson's gas station to get gasoline. At that time a transfer truck was coming from the west on Route 30, the Lincoln Highway; that he first noticed it when it was 100 to 200 feet away; that it was a wet, foggy and slippery day and that the truck was going much faster than he drove. John testified that perhaps he was not a fair judge of the speed of automobiles but he thought it was going between 50 and 60 miles an hour. He saw it going up and heard a crash and then looked up. He did not see the actual crash. After the crash John saw the transfer truck stop at the southwest corner of the pavement, saw the plaintiffs' Studebaker go on on to the southeast and against the gasoline station on the southeast corner. John testified that

the windshiled wiper on his car was working; that 10 or 15 feet north of the Lincoln Highway there was a stop sign.

Eugene Boucher was also called as a witness. He testified that he was riding with his father-in-law, John Kahn; that he did not see the Peterson automobile before the accident; that he and his father-in-law had turned into Larson's garage; that he was getting out of the car facing in an easterly direction when he heard a crash and then ran over to the scene of the accident.

Another witness produced by the plaintiff, Walden R. Larson, testified that he ran a garage at the northwest corner of Route 30 and 45; that on the day of the accident at about 4:30 P. M. he was in the garage and heard a crash. He looked out of the window and saw the defendant's transport truck go by. It was then about 20 feet west of the garage. He stated that in his opinion it was going about 50 miles an hour. He did not see the collision.

Charles A. Peterson, one of the plaintiffs and driver of the car in which Sarah F. Peterson, his wife, was riding, testified that he was driving a two-door Studebaker car; that they left Battle Creek, Michigan in the morning, arrived in Kankakee some time after noon, found they had lost their direction and were retracing their route; that it was gloomy and had rained most of the day; that they were driving south on Route 45 having already traveled about 200 miles; that Mrs. Peterson was sitting with him in the front seat and that as they came up to Route 30, the Lincoln Highway and about 330 feet from Route 30 there was a large sign at the right side of the road on which was printed "Caution"; that he slowed down; that there was a car ahead of him about 20 or 25 feet; that it was very murky, at times one could see quite a distance and then not very far. His opinion was that he could see 100 feet; that when it cleared up he could see about 100 or 150 feet; that he had the bright lights on; that after he passed the caution sign and about 50 feet from the north edge of

the windshield wiper on his car was working; that 10 or 15 feet north of the Lincoln Highway there was a stop sign.

Eugene Bowsher was also called as a witness. He testified that he was riding with his father-in-law, John Eden; that he did not see the Peterson automobile before the accident; that he and his father-in-law had turned into Larson's garage; that he was getting out of the car facing in an easterly direction when he heard a crash and then ran over to the scene of the accident.

Another witness produced by the plaintiff, Haldan H. Larson, testified that he ran a garage at the northwest corner of Route 30 and 45; that on the day of the accident at about 4:30 P. M. he was in the garage and heard a crash. He looked out of the window and saw the defendant's transport truck go by. It was then about 20 feet west of the garage. He stated that in his opinion it was going about 60 miles an hour. He did not see the collision.

Charles A. Peterson, one of the plaintiffs and driver of the car in which Sarah A. Peterson, his wife, was riding, testified that he was driving a two-door Studebaker car; that they left Battle Creek, Michigan in the morning, arrived in Cambridge some time after noon, found they had lost their direction and were retracing their route; that it was gloomy and had rained most of the day; that they were driving south on Route 45 having already traveled about 300 miles; that Mrs. Peterson was sitting with him in the front seat and that as they came up to Route 30, the Lincoln Highway and about 150 feet from Route 30 there was a large sign at the right side of the road on which was printed "Caution"; that he slowed down; that there was a car ahead of him about 30 or 35 feet; that it was very murky, at times one could see quite a distance and then not very far. His opinion was that he could see 100 feet; that when it cleared up he could see about 100 or 150 feet; that he had the bright lights on; that after he passed the caution sign and about 30 feet from the north edge of

Route 30 there was a stop sign; that he came to a stop 30 feet back of another car ahead of him; that the car moved to the west into Larson's station; that he then looked to the left and to the right and came to a stop. He said, "I was not able to see any traffic coming and did not see any", that after coming to a stop he proceeded to within five feet of the Lincoln Highway and stopped again. It was raining at the time and he had both windshield wipers working; that Mrs. Peterson sitting on the right-hand side of the front seat had let the window down at her immediate right so that he could see through without any obstruction; likewise, Mrs. Peterson, sitting there with the window down 10 inches, could look out of the window without any obstruction; that when he came up to the Lincoln Highway and stopped he could not see more than 50 or 60 feet; that he could see east on the Lincoln Highway because that was clear; that he looked to the east and then to the west; that the window along side Mrs. Peterson being down 10 inches to a foot from the top he had a clear and unobstructed view; that his eyesight was good and that he looked west 100 to 150 feet; that the rain was coming in from the west on Mrs. Peterson's shoulder and that through the mist he could see to the other side of Lincoln Highway a distance of about 40 feet. He started to go across; does not remember when he blew his horn; that he had good brakes on his Studebaker car; that when he went across the Lincoln Highway he was going from 5 to 8 miles an hour and at that speed he could stop within 8 feet and that he did not put his brakes on at any time going across.

Mrs. Sarah F. Peterson also testified to the effect that they left Battle Creek, Michigan at about 6:00 o'clock in the morning, and that previous to the time of the accident they were going south on Route 45, and that they saw a caution sign. "Q. Did you do anything or say anything when you saw this caution sign? A. Yes. I

there is no stop sign; that he was in a zone 35 feet back of another car ahead of him; that the car moved to the west into Larson's station; that he then looked to the left and to the right and came to a stop. He said, "I was not able to see any traffic coming and did not see any", that after coming to a stop he proceeded to within five feet of the Lincoln Highway and stopped again. It was raining at the time and he had both windshield wipers moving; that Mrs. Peterson sitting on the right-hand side of the front seat had let the window down at her immediate right so that he could see through without any obstruction; likewise, Mrs. Peterson, sitting there with the window down 10 inches, could look out of the window without any obstruction; that when he came up to the Lincoln Highway and stopped he could see more than 60 or 65 feet; that he could see east on the Lincoln Highway because that was clear; that he looked to the east and then to the west; that the window along side Mrs. Peterson being down 10 inches to a foot from the top he had a clear and unobstructed view; that his eyesight was good and that he looked east 10 to 150 feet; that the train was coming in from the west on Ave. Peterson's windshield and that through the mist he could see to the other side of Lincoln Highway a distance of about 60 feet. He started to go across; does not remember when he blew his horn; that he had good brakes on his Studebaker car; that when he went across the Lincoln Highway he was going from 8 to 9 miles an hour and at that speed he could stop within 6 feet and that he did not put his brakes on at any time going across.

Mrs. Sarah E. Peterson also testified to the effect that they left Hustle Creek, Michigan at about 5:00 o'clock in the morning, and that previous to the time of the accident they were going south on Route 45, and that they saw a caution sign. Q. Did you do anything or say anything when you saw this caution sign? A. Yes. I

called to him - I reminded Charley of the caution sign". At that time Mrs. Peterson did not see any other cars behind or ahead of them. As they came up to Route 30 she saw the stop sign on the right-hand side of the road; they came to a stop behind it; they had the lights burning on their automobile. It was raining, dark and murky, and the window at her right had not been up all the time; that the window was open; that they came to a stop behind another automobile and stopped about five feet before entering Route 30; that they did not see any traffic on the road at the time.

Evidence offered by the defendant upon the questions involved in this case is the testimony of a witness named Harold D. Dennis, who testified that he was at the gas station at the place in question and witnessed the accident which occurred about 3:30 or 4:00 o'clock in the afternoon; that he had been at the service station and started south on Route 45; that he came up to the Lincoln Highway and stopped at the right-hand side; that at that time there were no other cars beside him or in front of him; that he saw the defendant's truck coming from the west, and when he first saw the truck it was 500 or 600 feet to the west of him, and that Dennis did not have any lights on his automobile, nor were there any lights on the truck; that he noticed the truck coming from the west at about 40 or 45 miles an hour; he sat there and waited for it to go by; that as he sat there a car came up from behind him at the side and passed him, which was the Peterson car. He testified further that it passed into the Lincoln Highway without stopping and struck the front part of the truck at the cab on the left-hand side. To the same effect is the testimony of E. J. Heisler, who was operating the filling station at the southeast corner of Route 30 and 45. He was a witness to the accident; sat at the window in his garage, and first saw the defendant's truck coming east at a distance of 200 feet west of Route 45. At that point there was a hill or incline and the truck

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was coming down the hill traveling at a speed of about 40 miles an hour. He saw a car standing, being that of Harold D. Dennis, at the intersection; that at the same time the truck was coming towards the intersection the plaintiffs' car passed it on the left-hand side without stopping, and came into the intersection. The southbound Peterson car struck the eastbound truck between the cab and the door; that Peterson's car came through the stop sign without stopping and was moving at a speed of from 25 to 30 miles an hour.

Charles F. Beebe, the defendant's truck operator, testified that he delivered a load to Cedar Rapids, Iowa, and was returning to Detroit; that the truck had a governor on it by which the speed was governed, so that it was impossible to drive more than 40 miles an hour; that he did not have the lights burning on the truck; that he proceeded east over on the right-hand side of the road, and when he was 300 feet from Route 45 he looked towards his left and saw no southbound traffic; that before he got to the intersection he looked again both ways and saw the plaintiff's automobile 15 feet to his left and making a noise and going very fast. This witness did not notice whether it had burning lights on it or not, but Peterson's car came into the side of the cab where Beebe was driving. The collision took place in the fourth or right lane of both intersections. After the collision Beebe stopped his truck at a distance of 20 feet. From the force of the collision Beebe was thrown out of the truck to the ground, and the truck sustained a broken spring, and was damaged otherwise. He testified that Peterson's car went 65 or 70 feet before stopping and collided into the side of Heisler's gas station.

So from the facts as we have detailed them in this opinion the questions were controverted ones. This is clear from the evidence as to the speed at which the plaintiffs' as well as the defendant's car was traveling, and the testimony of the witnesses introduced by the defendant to establish the facts regarding distances. All of these

was coming down the hill travelling at a speed of about 40 miles an hour. He saw a car standing, facing that of Grella's, across, at the intersection; that at the same time the truck was coming towards the intersection the plaintiff's car passed it on the left-hand side without stopping, and came into the intersection. The southbound Patterson car struck the eastbound truck between the cab and the door; the Patterson's car came through the stop sign without stopping and was moving at a speed of from 35 to 50 miles an hour.

Charles E. Beebe, the defendant's truck operator, testified that he delivered a load to Cedar Knolls, Iowa, and was returning to Detroit; that the truck had a governor on it by which the speed was governed, so that it was impossible to drive more than 40 miles an hour; that he did not have the lights burning on the truck; that he proceeded east over on the right-hand side of the road, and when he was 200 feet from Route 45 he looked towards his left and saw no southbound traffic; that before he got to the intersection he looked again both ways and saw the plaintiff's automobile 10 feet to his left and making a noise and going very fast. This witness did not notice whether it had burning lights on it or not, but Patterson's car came into the side of the cab where Beebe was driving. The collision took place in the fourth or right lane of both intersections. After the collision Beebe stopped his truck at a distance of 30 feet. From the force of the collision Beebe was thrown out of the truck to the ground, and the truck sustained a broken spring, and was bowled otherwise. He testified that Patterson's car went 65 or 70 feet before stopping and collided into the side of Grella's gas station.

So from the facts as we have detailed them in this opinion the questions were controverted ones. This is clear from the evidence as to the speed at which the plaintiffs' as well as the defendant's car was travelling, and the testimony of the witnesses introduced by the defendant to establish the facts regarding distances. All of these

facts were controverted and were for the jury to decide, both from the evidence of the plaintiffs to establish facts as alleged in their complaint, and the evidence offered by the defendant.

The defendant contends that the court erred in permitting plaintiffs' counsel to interrogate the jurors on their voir dire examination by questions which directly or indirectly implied that an accident insurance company was interested in the defense of the case, and points to the fact that on the day of the trial plaintiffs' counsel tendered to the court and filed of record an affidavit. In the verified affidavit plaintiffs' counsel states he was informed that the defendant, Andrew Clark, was insured against liability for injuries by the Associated Indemnity Corporation; that that corporation was an insurance company and engaged in the business of writing automobile liability insurance, having a mid-west department at 166 West Van Buren Street, Chicago; that it was stock company paying dividends; that that company made an investigation and employed attorneys of record to defend the case; that the insurance company is interested in the result of the suit and liable to pay any judgment. The plaintiffs asked and obtained leave to question the jurors as follows:

> "1. Have you any financial interest, either as stockholders, policy holders, or otherwise, in the Associated Indemnity Corporation?
>
> 2. Have any of you any friends or relatives who are employed by that concern in any capacity?"

There was no response to either question.

In passing upon a like question the Supreme Court in Smithers v. Henriquez, 368 Ill. 588, said:

> "While the filing of an affidavit and a preliminary determination of the right to question the jurors as to their qualifications in any respect is unnecessary, it is a commendable practice where it is claimed the subject matter is prejudicial. It protects the opposing litigant from the subject being impressed upon the jury by an altercation or discussion in their presence, and tends to

facts were controverted and were for the jury to decide, both from the evidence of the plaintiffs to establish facts as alleged in their complaint, and the evidence offered by the defendant.

The defendant contends that the court erred in permitting plaintiffs' counsel to interrogate the jurors on their voir dire examination by questions which directly or indirectly implied that an accident insurance company was interested in the outcome of the case, and points to the fact that on the day of the trial plaintiffs' counsel tendered to the court and filed of record an affidavit. In the verified affidavit plaintiffs' counsel states he was informed that the defendant, Andrew Blair, was insured against liability for injuries by the associated Indemnity Corporation; that that corporation was an insurance company and engaged in the business of writing automobile liability insurance, having a mid-west department at 100 West Van Buren Street, Chicago; that it was which company having divisions; that that company could no investigation and employed attorneys of record to defend the case; that the insurance company is interested in the result of the suit and liable to pay any judgment. The plaintiffs asked and obtained leave to question the jurors as follows:

"1. Have you any financial interest, either as stockholders, policy holders, or otherwise, in the associated Indemnity Corporation?

2. Have any of you any friends or relatives who are employed by that company in any capacity?"

There was no response to either question.

In passing upon a like question the Supreme Court in Daniels v. Knickerbocker, 322 Ill. 282, said:

"While the filing of an affidavit and a preliminary determination of the right to question the jurors as to their qualifications in any manner is unnecessary, it is a commendable practice where it is claimed the subject matter is prejudicial. It prevents the opposing litigant from the subject being introduced upon the jury by an interruption or discussion in their presence, and tends to

show good faith of the proponent. Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case. * * * *

The proposed inquiry was disclosed to the court and opposing counsel in chambers and fully discussed before any attempt was made to interrogate the jurors. The record does not show the employment of any subterfuge to inform the jury that an insurance company was defending the suit, or any other improper motive or misconduct on the part of plaintiff's counsel. From the record it appears the inquiry was for the purpose of exercising the right of challenge."

From an examination of the record we find nothing which would indicate that the motive was other than to ascertain from the jurors whether they were interested in the outcome of the litigation in any way, and as stated by the Supreme Court: "Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case". When we come to consider the verdict that was returned in the instant case, it does not appear that the jurors were influenced by reason of the questions submitted to them upon their examination to act as jurors.

The defendant contends that the plaintiff Sarah F. Peterson was guilty of contributory negligence in that the plaintiff failed to prove that before and at the time of the accident in question she was in the exercise of due care and caution for her own safety, and for that reason the trial court should have directed a verdict for the defendant. When we consider the statement of facts, which we have incorporated in this opinion, this was a question for the jury to determine.

The defendant also contends that the plaintiff, Sarah F. Peterson, when approaching Lincoln Highway did not indicate to the co-plaintiff, her husband, that they were approaching an intersection, and that there was not alone a caution sign in the highway, but also a stop sign, indicating that they were required to stop at this highway.

show good faith of the proceeding. Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case. " " " "

The proposed inquiry was disclosed to the court and opposing counsel in chambers and fully discussed before any attempt was made to interrogate the jurors. The record does not show the employment of any subterfuge to inform the jury that an insurance company was defending the suit, or any other improper motive or misconduct on the part of plaintiff's counsel. From the record it appears the inquiry was for the purpose of exercising the right of challenge."

From an examination of the record we find nothing which would indicate that the motive was other than to ascertain from the jurors whether they were interested in the outcome of the litigation in any way, and as stated by the supreme Court: "Under his duty as a lawyer and to his client, plaintiff's counsel was required to exercise all lawful means known to him to see that no interested party sat as a juror in the case." Then we come to consider the verdict that was returned in the instant case, it does not appear that the jurors were influenced by reason of the questions submitted to them upon their examination to act as jurors.

The defendant contends that the plaintiff Sarah F. Peterson was guilty of contributory negligence in that the plaintiff failed to prove that before and at the time of the accident in question she was in the exercise of due care and caution for her own safety, and for that reason the trial court should have directed a verdict for the defendant. When we consider the statement of facts, which we have incorporated in this opinion, this was a question for the jury to determine.

The defendant also contends that the plaintiff, Sarah F. Peterson, when approaching Lincoln Highway did not indicate to the co-plaintiff, her husband, that they were approaching an intersection, and that there was not along a caution sign in the highway, but also a stop sign, indicating that they were required to stop at this highway

The fact is that the plaintiff did indicate to her husband when they came in view of the caution sign, and directed his attention to it; also that her husband, who was in control of the automobile, stopped in the approach to the Lincoln Highway, and there is evidence that Mrs. Peterson looked towards the west, as did Mr. Peterson to the east and west to determine whether cars were approaching, and after ascertaining that no cars were approaching, proceeded to cross Lincoln Highway. There is evidence in the record that the defendant's truck was approaching at a speed of from 50 to 60 miles an hour. This evidence, however, is contradicted by witnesses who were produced by the defendant, both as to the rate of speed of the truck and as to the distance it was from the intersection. One witness testified that when he looked it was 500 or 600 feet away, and that the plaintiffs' car proceeded onto the highway and ran into the side of this truck; that at the time the truck was traveling at a speed of from 40 to 45 miles an hour. Now, these are questions of fact for a jury, and it was for the jury to determine whether the plaintiff, Sarah F. Peterson, was in the exercise of due care and caution for her own safety.

The defendant contends that the driver of his truck was not negligent, and that he had the right of way. In considering the question of whether or not the record shows negligent operation of the defendant's truck, it is necessary to turn to the evidence and determine what the proof was as to the movements of the defendant's truck and its operation. As we have previously indicated, it was for the jury to determine from the facts the questions involved in this litigation, and we believe from the facts as they appear in the record the operation of defendant's truck was negligent. It was also for the jury to determine whether defendant's driver was

The fact is that the plaintiff did indicate to her husband when they came in view of the station sign, and directed his attention to it; also that her husband, who was in control of the automobile, stopped in the approach to the lincoln highway, and there is evidence that Mrs. Patterson looked towards the west, as did Mr. Patterson to the east and west to determine whether here were approaching, and after ascertaining that no cars were approaching, proceeded to cross Lincoln Highway. There is evidence in the record that the defendant's truck was approaching at a speed of from 50 to 60 miles an hour. This evidence, however, is contradicted by witnesses who were produced by the defendant, both as to the rate of speed of the truck and as to the distance it was from the intersection. One witness testified that when he looked it was 300 or 500 feet away, and that the plaintiffs' car proceeded onto the highway and ran into the side of this truck; that at the time the truck was traveling at a speed of from 40 to 45 miles an hour. Now, these are questions of fact for a jury, and it was for the jury to determine whether the plaintiff, Sarah F. Patterson, was in the exercise of due care and caution for her own safety.

The defendant contends that the driver of his truck was not negligent, and that he had the right of way. In considering the question of whether or not the record shows negligent operation of the defendant's truck, it is necessary to turn to the evidence and determine what the proof was as to the movements of the defendant's truck and its operation. As we have previously indicated, it was for the jury to determine from the facts the questions involved in this litigation, and we believe from the facts as they appear in the record the operation of defendant's truck was negligent. It was also for the jury to determine whether defendant's driver was

subject to the charge of wilful and wanton misconduct, made by the plaintiffs in the second count of their complaint. But the defendant answers this charge by stating that the plaintiff Sarah F. Peterson and Charles A. Peterson were guilty of wilful and wanton misconduct and that this contributed as a proximate cause of the accident and to the injuries sustained by Mrs. Peterson.

There is evidence in the record that the defendant's driver operated his truck and trailer towards the intersection at a rate of speed of from 50 to 60 miles an hour without giving any warning, without looking out or having the truck under proper control. It also appears from the facts that the drivers complained that neither saw each other before the collision, which would indicate that visibility was poor, but the evidence does disclose that the bright lights were burning on the plaintiff's car, and that the lights on the defendant's car were not burning at the time of the accident. Our attention has been called to the case of Walldren Express Co. v. Krug, 291 Ill. 472, where the court said:

> "Whether the negligent conduct of a defendant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury."

See also Heneghan v. Goldberg, 296 Ill. App. 253.

While the speed at which the defendant's truck was going at the time of the accident appears in the record, still to determine whether there was wilful and wanton misconduct in the operation of the defendant's truck the jury was required to take into consideration all the facts and circumstances surrounding the collision and determine that question, and we believe from the facts as they appear in the record there was sufficient evidence for the jury to consider whether the operation of the truck by the driver constituted wilful

subject to the charge of wilful and wanton misconduct, made by the plaintiffs in the second count of their complaint. We the defendant answer this charge by stating that the plaintiff Frank T. Peterson and Charles A. Peterson were guilty of wilful and wanton misconduct and that this contributed as a proximate cause of the accident and to the injuries sustained by Mrs. Peterson.

There is evidence in the record that the defendant's driver operated his truck and trailer towards the intersection at a rate of speed of from 50 to 60 miles an hour without giving any warning, without looking out or having the truck under proper control. It also appears from the facts that the drivers acquainted that neither saw each other before the collision, which would indicate that visibility was poor, but the evidence does disclose that the right lights were burning on the plaintiff's car, and that the lights on the defendant's car were not burning at the time of the accident. Our attention has been called to the case of Philadelphia Rapid Co. v. Kane, 291 Ill. 472, where the court said:

> "Whether the negligent conduct of a defendant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury."

See also Ibberson v. Quickery, 326 Ill. App. 382.

While the speed at which the defendant's truck was going at the time of the accident appears in the record, still to determine whether there was willful and wanton misconduct in the operation of the defendant's truck the jury was required to take into consideration all the facts and circumstances surrounding the collision and determine that question, and we believe from the facts as they appear in the record there was sufficient evidence for the jury to consider whether the operation of the truck by the driver constituted willful

and wanton misconduct.

We have considered the facts as they appear in the record and we are of the opinion that there is no evidence upon which the jury would be justified in finding that Mrs. Peterson was guilty of wilful and wanton misconduct at the time of the accident.

The plaintiff calls to our attention the definition of a wilful and wanton act contained in the Motor Vehicle Act, Par. 145, Sec. 48, Ch. 95-1/2, Ill. State Bar Stats. 1937, as follows:

> "Reckless Driving. Any person who drives any vehicle with a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving."

and plaintiff further states that the expression "wilful and wanton act" or "wilful and wanton conduct" has been very frequently defined by the courts of this state. Many of these definitions include the phrase "of such a reckless character as to exhibit an utter disregard for the safety and lives of other persons." And it appears that the defendant, in the instant case, in the trial court, adopted this definition. Defendant's Instruction No. 27 is in part as follows:

> "Wantonness is such a gross want of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury, and unless the plaintiff has proved that the defendant was guilty of such gross want of care and regard for the rights and safety of others as to imply a disregard of consequences and a willingness to inflict injury, you cannot find the defendant guilty of wantonness and wilfulness. Wilfulness sometimes implies an intention to inflict an injury, and sometimes it is evidenced by such a want of care and regard for the rights and safety of others as implies a complete disregard of consequences. You cannot find the defendant guilty of wilfulness unless you believe from a preponderance of the evidence that the defendant intentionally inflicted the injury complained of, or that the conduct of the defendant indicated such a want of care for the safety of others as implied a complete disregard of consequences."

In passing upon this question the jury were instructed and considered the instruction we have just quoted, and determined from the facts that there was wilful and wanton conduct on the part of the defendant's agent in the operation of the truck at the time of the accident.

and wanton misconduct.

We have considered the facts as they appear in the record and we are of the opinion that there is no evidence upon which the jury could be justified in finding that gross negligence was guilty of wilful and wanton misconduct at the time of the accident.

The plaintiff calls to our attention the definition of a wilful and wanton act contained in the Motor Vehicle Act, Par. 142, Sec. 48, Ch. 95-1/2, Ill. State Bar Stats. 1957, as follows:

"Reckless Driving. Any person who drives any vehicle with a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving."

and plaintiff further states that the expression "wilful and wanton act" or "wilful and wanton conduct" has been very frequently defined by the courts of this state. Many of these definitions include the phrase "of such a reckless character as to exhibit an utter disregard for the safety and lives of other persons." And it appears that the defendant, in the instant case, in the trial court, adopted this definition. Defendant's instruction No. 27 is in part as follows:

"Wantonness is such a gross exhibition of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury, and unless the plaintiff has proved that the defendant was guilty of such gross want of care and regard for the rights and safety of others as to imply a disregard of consequences and a willingness to inflict injury, you cannot find the defendant guilty of wantonness and wilfulness. Wilfulness sometimes implies an intention to inflict an injury, and sometimes it is evidenced by such a want of care and regard for the rights and safety of others as implies a complete disregard of consequences. You cannot find the defendant guilty of wilfulness unless you believe from a preponderance of the evidence that the defendant intentionally inflicted the injury complained of, or that the conduct of the defendant indicated such a want of care for the safety of others as implied a complete disregard of consequences."

In passing upon this question the jury were instructed and considered the instruction we have just quoted, and determined from the facts that there was wilful and wanton conduct on the part of the defendant's agent in the operation of the truck at the time of the accident.

And finally, the defendant contends there was error in the giving of certain of plaintiffs' instructions. We have examined these instructions and believe there is no such error as to justify a reversal of the cause, and that the court was justified in entering judgment on the verdict of the jury. The judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

40522

PAULINE McBRIDE, as Trustee,
Plaintiff - Appellant,
v.
LEONARD W. BOLTZ,
Defendant - Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

8A

300 I.A. 607

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered by the court in an action for rent and certain other sums due the plaintiff from the defendant, under the covenants of a lease under seal, which judgment was entered against the plaintiff on the verdict of the jury finding the defendant not guilty.

This is an action by the plaintiff against the defendant, a tenant, to collect a balance of $400 as rental due under a lease which by its terms expired on August 31, 1939. On or about September 23, 1935, after $500 was paid to the plaintiff by the defendant to apply on the accrued rental of $900, the lease was cancelled by mutual consent. The defendant, while admitting that the accrued rental was $900 on August 6, 1935 and that only $500 was thereafter paid, contends that at the time of the cancellation of the lease, he relinquished his rights under said lease and entered into a new lease for the premises and paid the $500 in full accord and satisfaction of all demands of the plaintiff as lessor.

The lease between the parties for the premises in question was dated September 1, 1934, and was for a term from September 1, 1934, until August 31, 1939, at a monthly rental beginning with $350 per month and increasing annually until the rent was $500 per month for the final year of the term.

In August,1935 the plaintiff levied a distress warrant on the property of the defendant in the premises for the $900 rent due, and shortly thereafter the custodian released said levy, at the direction of the plaintiff, turned the property back and quit the premises.

40833

PAULINE MOORE, as trustee,

Plaintiff - Respondent,

v.

LEONARD S. SMITH,

Defendant - Appellee.

SUPREME COURT

CIRCUIT COURT

COOK COUNTY.

300 I.A. 607

MR. JUSTICE MCGOOEY DELIVERED THE OPINION OF THE COURT.

This is an appeal to the plaintiff from a judgment entered by the court in an action for rent and certain other sums due the plaintiff from the defendant, under the covenants of a lease under seal, which judgment was entered against the plaintiff on the verdict of the jury finding the defendant not guilty.

This is an action by the plaintiff against the defendant, a tenant, to collect a balance of $800 as rental due under a lease which by its terms expired on August 31, 1932. On or about September 23, 1932, after $300 was paid to the plaintiff by the defendant to apply on the accrued rental of $900, the lease was cancelled by mutual consent. The defendant, while admitting that the accrued rental was $900 on August 8, 1932 and that only $300 was thereafter paid, contends that at the time of the cancellation of the lease, he relinquished his rights under said lease and entered into a new lease for the premises and paid the $300 in full accord and satisfaction of all demands of the plaintiff as lessor.

The lease between the parties for the premises in question was dated September 1, 1924, and was for a term from September 1, 1924, until August 31, 1932, at a monthly rental beginning with $100 per month and increasing annually until the rent was $300 per month for the final year of the term.

In August,1932 the plaintiff levied a distress warrant on the property of the defendant in the premises for the $300 rent due, and shortly thereafter the constables released said levy, at the direction of the plaintiff, turned the property back and quit the

There was evidence on behalf of the plaintiff that the defendant, through his agent, offered to pay $500 to have the property released with the understanding that the balance of $400 would be paid thereafter; that at the time the $500 was paid to the plaintiff, as appears from the evidence, the defendant then and there stated he would be unable to go on with the lease and requested the plaintiff to enter into a lease with him for the term of the old lease at a reduced rental; that as a result of the meeting, the plaintiff agreed to enter into a new lease at a reduced rental for a short period. The term of the old lease was five years, and the new lease was for a term of one year at a rental of $300 per month. From the evidence of the defendant it appears that at the meeting in September with the plaintiff the defendant told the plaintiff that he would pay $500 in full satisfaction of the $900 and the other charges, and that as consideration therefor, he would consent to the cancellation of the old lease and would enter into the new lease; that at the time of this conversation there was present with him his brother, who was the manager of the premises and that in the presence of his brother he paid the plaintiff $500 and got his receipt for it. The defendant was corroborated by his brother, Clem Boltz, who testified he was present at the conversation when the settlement was made between the plaintiff and the defendant, and testified further that "Mr.Jetzinger suggested that my brother enter into a shorter lease; that if my brother gave him $500.00 he would enter into a new lease and cancel the other $400.00. My brother said 'that meets with my approval.'" There was also offered in evidence by the plaintiff a new lease for a one year period.

The plaintiff contends that the court was in error in allowing the defendants' Exhibits 1, 2 and 3 in evidence; that these exhibits being receipts for rent signed by David Jetzinger and dated April 3rd,

There was evidence on behalf of the plaintiff that the defendant, through his agent, allowed to pay £300 to have the property released with the understanding that the balance of £400 would be paid thereafter; that at the time the £300 was paid to the plaintiff, as appears from the evidence, the defendant then and there stated he would be unable to go on with the lease and requested the plaintiff to enter into a lease with him for the term of the old lease at a reduced rent.; that as a result of the meeting, the plaintiff agreed to enter into a new lease at a reduced rental for a short period. The term of the old lease was five years, and the new lease was for a term of one year at a rental of £300 per month. From the evidence of the defendant it appears that at the meeting in September with the plaintiff the defendant told the plaintiff that he could pay £300 in full satisfaction of the £900 and the other charges, and that on consideration thereof, he would consent to the cancellation of the old lease and would enter into the new lease; that at the time of this conversation there was present with him his brother, who was the manager of the premises and that in the presence of his brother he paid the plaintiff £300 and got his receipt for it. The defendant was corroborated by his brother, Elie Moiz, who testified he was present at the conversation when the settlement was made between the plaintiff and the defendant, and testified further that "Mr.Jetsinger suggested that my brother enter into a shorter lease; that if my brother pays six £300.00 he would enter into a new lease and cancel the other £900.00. My brother said that was with my approval." There was also offered in evidence by the plaintiff a new lease for a one year period.

The plaintiff contends that the court was in error in allowing the defendants' Exhibits 1, 2 and 3 in evidence; that these exhibits being receipts for rent signed by David Jetsinger and dated April 3rd,

22nd and May 2nd, 1936, respectively, were not introduced for the purpose of showing that rent was paid under the second lease, and were not proper for the purpose introduced. The defendant contends that the only reason for introducing the exhibits was to show that the plaintiff did not consider that any rent under the old lease was due after September, 1935, and from an inspection of these receipts it does not appear that any amount was due for the balance of the rent.

The verdict is questioned by the plaintiff on the ground that it is against the manifest weight of the evidence. While the controversy in question is whether the sums of money due the plaintiff under the terms of the old lease were discharged by the defendant, still the subject matter was presented to the jury who had all the evidence as well as the exhibits before them, and it is not the duty of this court to pass upon the credibility of the witnesses or the weight of the evidence offered.

Another question is that the burden of proving the affirmative defense of accord and satisfaction rested upon the defendant, and he failed to prove that defense by a preponderance of the evidence.

There is evidence that the defendant offered cancellation of his lease for the balance of the term and, as agreed to by the parties, a lease for a shorter term was entered into and accepted by the parties. From the evidence of both the defendant and his brother, the adjustment entered into and the receipts signed by the plaintiff for moneys received under the terms of the new lease would indicate that there was not a balance still due under the terms of the old lease, which was cancelled.

While there is also evidence in the record of letters written by Mr. Jetzinger addressed to Boltz regarding the payment

23rd and May 2nd, 1936, respectively, were not introduced for the purpose of showing that rent was paid under the second lease, and were not proper for the purpose introduced. The defendant contends that the only reason for introducing the exhibits was to show that the plaintiff did not consider that any rent under the old lease was due after September, 1935, and from an inspection of these receipts it does not appear that any amount was due for the balance of the rent.

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There is evidence that the defendant offered cancellation of his lease for the balance of the term and, as agreed to by the parties, a lease for a shorter term was entered into and accepted by the parties. From the evidence of both the defendant and his brother, the defendant entered into and the receipts signed by the plaintiff for moneys received under the terms of the new lease would indicate that there was not a balance still due under the terms of the old lease, which was cancelled.

While there is also evidence in the report of letters written by Mr. Lattinger addressed to Dolts regarding the payment

of the balance due, still, as we have indicated, that question was for the jury to consider, which the jury did and returned their verdict.

As to whether there was adequate consideration to support an accord and satisfaction, that also was a question for the jury, and the evidence which tends to sustain the consideration was the cancellation of the old lease by the parties and the execution of the new lease entered into by them.

For the reasons stated the judgment of the court is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

4

of the balance i.e. still, as we have indicated, that question was for the jury to consider, which the jury did and returned their verdict.

As to whether there was adequate consideration to support an account and satisfaction, that also was a question for the jury, and the evidence which went to establish the consideration and the consolidation of the old issue by the parties and the adoption of the new issue entered into by them.

For the reasons stated the judgment of the court is affirmed.

JUDGMENT AFFIRMED.

CASE 8. MOLITOR, C.J. (ST CLAIR, J. CONCUR.

40306

THOMAS BARNOWSKY,
Appellant,

v.

MAYFAIR LAUNDRY COMPANY, a corporation, ANTON NOVAK, STEPHEN J. DOMBROWSKI, JOE ROMANICK, FRANK JAKUBIEC and W. A. LEOPOLD,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

300 I.A. 607

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was an action to enforce a claim arising under the Illinois Securities Law (ch. 32, Cahill's Ill. Rev. Stats. 1929). It was tried by the court without a jury. At the conclusion of plaintiff's case defendants' oral motion for a finding for defendants was allowed, and plaintiff appeals from a judgment entered upon the finding.

Plaintiff's verified complaint alleges, inter alia, that on June 17, 1930, defendants sold him fifty shares of stock of the Mayfair Laundry Company, a corporation, defendant, for which he paid the sum of $2,500; that thereafter he discovered that defendants had failed to comply with the provisions of the Illinois Securities Law in that they did not prior to June 17, 1930, nor at any subsequent time, file or cause to be filed in the office of the Secretary of State of the State of Illinois, a statement or inventory of any kind, character or description, as is required by the provisions of the Act, "describing the character of any securities or stock intended to be offered for sale, or sold, or a statement giving a detailed statement of the assets and liabilities of defendant corporation, or a statement of the income and an analysis of the surplus account or an inventory, or an appraisal of the assets of defendant corporation, or a statement, giving the names and addresses of the officers and directors of defendant corporation, or any kind or

40506

THOMAS BARTOSZKY,
Appellant,

v.

MAYFAIR LAUNDRY COMPANY,
a corporation, ARTHUR NOVAK,
STERLING L. MEMBERSHEIL, JR.,
FORMWICK, WALTER LEMUSZKO and
J. A. LEPOLD,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

900 I.A. 607

MR. PRESIDING JUSTICE SCHALAN DELIVERED THE OPINION OF THE COURT.

This was an action to enforce a claim arising under the Illinois Securities Law (ch. 32, Smith's Ill. Rev. Stats. 1929). It was tried by the court without a jury. At the conclusion of plaintiff's case defendants' oral motion for a finding for defendants was allowed, and plaintiff appeals from a judgment entered upon the finding.

Plaintiff's verified complaint alleges, inter alia, that on June 17, 1930, defendants sold him fifty shares of stock of the Mayfair Laundry Company, a corporation, defendant, for which he paid the sum of $2,500; that thereafter he discovered that defendants had failed to comply with the provisions of the Illinois Securities Law in that they did not prior to June 17, 1930, nor at any subsequent time, file or cause to be filed in the office of the Secretary of State of the State of Illinois, a statement or inventory of any kind, character or description, as is required by the provisions of the act, "describing the character of any securities or stock intended to be offered for sale, or sold, or a statement giving a detailed statement of the assets and liabilities of defendant corporation, or a statement of the income and an analysis of the surplus account or an inventory, or an appraisal of the assets of defendant corporation, or a statement, giving the names and addresses of the officers and directors of defendant corporation, or any kind or

character of statement or document whatsoever," as is required to be filed by the provisions of the Act; that the capital stock of defendant corporation was not listed on the New York, Boston or Chicago Stock exchange; that plaintiff was neither a broker nor dealer in securities or stocks; that because of defendants' failure to comply with the provisions of the Illinois Securities Law plaintiff, on September 5, 1930, September 21, 1932, and April 27, 1933, tendered to defendants the certificate of stock and demanded the return of said $2,500, and that defendants have refused to return to plaintiff the $2,500, etc.

The answers of defendants deny, in a general way, all of plaintiff's allegations save the one that plaintiff bought fifty shares of stock and paid $2,500 for the same.

Plaintiff, a Pole by birth, was fifty-nine years of age at the time in question, and judging from his evidence is illiterate and without business experience. He generally worked as a coppersmith, but before he came to Chicago, in 1927, he had farmed in Montana for some time. On June 2, 1930, he read an advertisement in the "Dziennik Chicagoski," a daily newspaper published in the Polish language and having a circulation of about 30,000, which advertisement read as follows: "Partner wanted with $2,500 or more, for laundry business which is a corporation and has a great future. Phone Kildare 5839 or call at 4421 Montrose Ave. before 8:00 P.M." The address and telephone number were that of Mayfair Laundry Company, a corporation, defendant. On June 3, 1930, plaintiff went to the address designated in the advertisement, which was the place of business of the Mayfair Laundry Company, where he met Anton Novak, defendant, secretary of the company. After a short talk with Novak, the latter showed plaintiff around the plant and asked him to call there the next day so that he could meet Stephen J. Dombrowski, defendant, president of the company. On June 4, 1930, plaintiff returned to the Laundry Company and there met Novak and Dombrowski. Plaintiff testified that

character of statement or document whatsoever," as is required to be filed by the provisions of the act; that the capital stock of defendant corporation was not listed on the New York, Boston or Chicago stock exchange; that plaintiff was neither a broker nor dealer in securities or stocks; that because of defendants' failure to comply with the provisions of the Illinois Securities Law plaintiff, on September 5, 1930, September 21, 1930, and April 27, 1933, tendered to defendants the certificate of stock and demanded the return of said $2,500, and that defendants have refused to return to plaintiff the $2,500, etc.

The answers of defendants deny, in a general way, all of plaintiff's allegations save the one that plaintiff bought fifty shares of stock and paid $2,500 for the same.

Plaintiff, a Pole by birth, was fifty-nine years of age at the time in question, and judging from his evidence is illiterate and without business experience. He generally worked as a carpenter, but before he came to Chicago, in 1927, he had farmed in Montana for some time. On June 2, 1930, he read an advertisement in the "Dziennik Chicagoski," a daily newspaper published in the Polish language and having a circulation of about 30,000, which advertisement read as follows: "Partner wanted with $2,500 or more, for laundry business which is a corporation and has a great future. Phone Kildare 5030 or call at 4421 Montrose Ave. before 8:00 P.M." ~~xxxxxxxxxxxxxxxx~~ The address and telephone number were that of Mayfair Laundry Company, a corporation, defendant. On June 3, 1930, plaintiff went to the address designated in the advertisement, which was the place of business of the Mayfair Laundry Company, where he met Anton Novak, defendant, secretary of the company. After a short talk with Novak, the latter showed plaintiff around the plant and asked him to call there the next day so that he could meet Stephen L. Sobrowski, defendant, president of the company. On June 4, 1930, plaintiff returned to the Laundry Company and there met Novak and Sobrowski. Plaintiff testified that

"Dombrowski and Novak showed me in slips, amount of bills, piece of paper, and he got it on book, and I didn't understand on book and see how money - I saw Novak and Dombrowski on June 4, 1930. They say he is good proposition. I think what we can going to do, and he says, you are going to come over with the money, and then he said you will be all right over here, he said, you will get your pay, and he says, if you are going to work over here, you get your pay, and you going to get dividends besides that. He says, you are going to work, you got steady job, and he going to pay so much if you be good. He said - if you put some money of $2,500, then he says you got a job here. Then he says, you get your $20 if you be like that, at least $20 a week. He says, if it picks up - Yes, you can be sure you are getting dividends besides that. Well, I think it is going to be all right. Then I give it the money, gave it to Novak. I give it to him $2,500. Then I don't have it - he don't have use for me. When I pay it then he don't have use for me. I work there around from June 9th to September 6th. I get pay $113. He pay me $10 a week, he pay me $15 a week, he pay me $3.50 a week. Well, he don't want to pay at all, then I quit. I got a certificate for 2 shares of stock. I don't remember when was it. Let's see. Two weeks after the second one. I pay check first. Novak and Dombrowski gave me the 2 shares in the office. Novak handed it to me, over on Clark Street some place. I believe I kept the 2 shares 2 weeks - 2 or 3 weeks. After 3 weeks I asked for what I paid, for the 50 shares; then I ask for 50 shares, I can't understand why it is 2 shares. I asked Novak and Dombrowski. He said, you are going to get the 50 shares and asked me to give the stock certificate back to them. Yes, they are going to get the 50 shares, - Dombrowski and Novak told me when I would give them back that certificate, I will get the 50 shares. Well, that happen right away, what he want to take away that certificate. He want to take away on me in some way and then I see that way what he start fooling around with me, then

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I quit and I ask him the last one. Yes, sir, I know Mr. Leopold. I saw him right in his office downtown. Novak and Dombrowski, he took me downtown. Yes, before I was once, and I was the next one. Leopold said, well, he said, he's got good proposition. Yes, that conversation with Leopold took place before I paid the $2,500 and some time later I went to Leopold's office downtown and Novak and Dombrowski were there. They took me there. They said he is going to give me 50 shares. When I first went to Leopold's office, I did not have the 2 shares of stock. He gave me the 2 shares of stock at his office. It was on June 5th. On June 5, Novak and Dombrowski took me to Leopold's office, that was the first time I saw him. Q. When you went to Leopold's office, did you already have a certificate for 2 shares? A. No, I not have it. It was on June 20th, second time. When I get the 2 shares at Leopold's office, I kept the 2 shares for about 2 or 3 weeks. No, that time I got that one and he said that way, if you can't make it in the laundry to get signed, then Dombrowski took it in. When I asked Novak and Dombrowski for 50 shares, he put it off, put it off. Yes, put them off, put them off; he don't have blanks, they don't have blanks. When he get blanks, he would give me. There was a few of them besides me, then he would give me. I signed no papers before I got the 50 shares of stock. Yes, I signed, but I don't know what it is, at Leopold's office. He say, sign it up, sign it up. He don't tell me, explain what it is for, just sign it. He read, but I don't understand what was it. No, I don't understand what it mean. Yes, I sign. Well, I say if I get the stock, well, I was going to sign, not before, then he said, you got the stock right here, and then I signed it. No, I sign it the same time when he give me - before he give me that certificate. Then after I sign it a few times, and then he give me that certificate, 2 shares. The 50 shares certificate I got 3 weeks after when I get. It was 3 weeks after when I get. Mr. Owen [attorney for appellee]: We contend that he was given two

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Mr. Owen [attorney for appellee]: He contend that he was given two

shares of stock; that he signed the application for the increase; that later, when it was received back, he got his fifty shares. That is the procedure." The witness continued: "Fifty shares of stock I got three weeks after when I get the two shares;" that he received from defendants a certificate for fifty shares of stock in the Laundry Company about three weeks after he had paid defendants the $2,500; that after he paid the $2,500 defendants gave him work sorting clothes in the laundry, and other laundry work; that when he demanded his money back "he say the money is gone, you never see it no more."

It is unnecessary for us to consider all of the points raised by plaintiff in support of his contention that the court erred in finding the issues for defendants at the close of plaintiff's evidence, for the reason that counsel for defendants, by the position they have taken in this court, have narrowed the questions to be considered by us. The sole grounds urged by defendants why the action of the trial court should be sustained are as follows: (a) "The stock sold to the plaintiff was in Class 'B' for the reason that it was an isolated transaction made by one of organizers of the corporation and not made as a successive and repeated transaction;" and (b) "while it is true that the burden of proof is upon the seller to establish exemption, this rule is not applicable where the evidence adduced by the plaintiff establishes such exemption." Several times in their brief defendants assert that their defense is that the sale of the stock was an isolated sale by Dombrowski; that he was the owner of the stock and one of the organizers of the corporation, and that therefore the case comes within the ruling in Snitzler-Warner Co. v. Stein, 234 Ill. App. 392. As to point (a), the assumption that the sale to plaintiff "was an isolated transaction made by [Dombrowski] one of organizers of the corporation" (italics ours) finds no support in the evidence. During the trial counsel for defendants admitted that plaintiff's check in the sum of $2,500 "was paid to the

shares of stock; that he signed the application for the increase; that later, when it was received back, he got his fifty shares. That is the procedure." The witness continued: "Fifty shares of stock I got three weeks after when I get the two shares;" that he received from defendants a certificate for fifty shares of stock in the Laundry Company about three weeks after he had paid defendants the $2,500; that after he paid the $2,500 defendants gave him work sorting clothes in the laundry, and other laundry work; that when he demanded his money back "he say the money is gone, you never see it no more."

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Mayfair Laundry Co. for certificate of stock and that it went into the Laundry, that the Mayfair Laundry Co. got the money." As to point (b), the assumption of fact contained therein that "the evidence adduced by the plaintiff establishes such exemption" finds no support in the record. Indeed, defendants have failed to point out facts and circumstances upon which they base the assumption. Counsel for defendants concede that "as a general proposition the burden of proof is upon the seller or issuer of securities to establish an exemption, and we further agree that this point was decided by this Court in the cases mentioned in his [plaintiff's] brief, i.e., Taft v. Otte, 274 Ill. App. 280, and Hudson v. Silver, 273 Ill. App. 40."

In Taft v. Otte & Co., this division of the court, in passing upon the question of the burden of proof, said (pp. 287-288): "In Dobal v. Guardian Finance Corp., 251 Ill. App. 220, 224, decided by the first division of this court, it was said: 'Further, according to the provisions of paragraph 2 of section 37 of that act, Cahill's St. ch. 32, par. 290, subd. 2, the burden of proof is put upon the seller or issuer to establish exemption from the act if exemption is claimed.' JJ. McSurely and O'Connor concurred in the opinion, written by Mr. Justice Matchett. In Abrams v. Love, 254 Ill. App. 428, 436, the Appellate Court of the second district held: 'To place the burden upon the plaintiff of proving that the stock in question was not exempted under the act would have the effect of destroying the beneficial purpose intended by the legislature when it enacted the statute.' After calling attention to the important fact that the act provides that 'all securities other than those falling within classes "A," "B" and "C," respectively, shall be known as securities in class "D,"' the court states that a burden practically impossible to carry would be placed upon the plaintiff if he were obliged to prove that the stock did not fall within Classes 'A,' 'B' and 'C' in order to establish that it did fall within Class 'D.'" We further said (p. 293): "Section 37 was intended as something more than a

Layfair Laundry Co. for certificates of stock and that it went into the laundry, that the Layfair Laundry Co. got the money." As to point (b), the assumption of fact contained therein that "the evidence adduced by the plaintiff establishes such assumption" finds no support in the record. Indeed, defendants have failed to point out facts and circumstances upon which they base the assumption. Counsel for defendants contends that "as a general proposition the burden of proof is upon the seller or issuer of securities to establish an exemption, and we further agree that this point was decided by this Court in the cases mentioned in his [plaintiff's] brief, i.e., Taft v. Otte, 274 Ill. App. 280, and Madden v. Silver, 275 Ill. App. 40." In Taft v. Otte & Co., this division of the court, in passing upon the question of the burden of proof, said (pp. 287-288): "In Dodd v. Guardian Finance Corp., 321 Ill. App. 420, 424, decided by the first division of this court, it was said: 'Further, according to the provisions of paragraph 2 of section 27 of that act, Smith's St. ch. 32, par. 190, subd. 2, the burden of proof is put upon the seller or issuer to establish exemption from the act if exemption is claimed.' 11. Moriarty and O'Connor concurred in the opinion, written by Mr. Justice Matchett. In Abrams v. Love, 294 Ill. App. 428, 436, the appellate court of the second district held: 'To place the burden upon the plaintiff of proving that the stock in question was not exempted under the act would have the effect of destroying the beneficial purpose intended by the legislature when it enacted the statute.' After calling attention to the important fact that the act provides that 'all securities other than those falling within classes "A," "B" and "C," respectively, shall be known as securities in class "D," the court states that a burden practically impossible to carry would be placed upon the plaintiff if he were obliged to prove that the stock did not fall within Classes 'A,' 'B' and 'C' in order to establish that it did fall within Class 'D.'" As further said (p. 203): "Section 27 was intended as something more than a

right without a remedy, and if its plain meaning and purpose are not followed the remedy is practically destroyed. The law is a wholesome and necessary one. One who sells securities in this State is bound to know the nature of the same and that he is acting within the law when he sells them; and when his right to sell the securities is challenged he should have no trouble, if he has acted within the law, to justify the sale." We further said (p. 294): "But if a defendant 'relies for his defense upon any of the exemptions provided for in this act' and alleges that the securities sold were exempt, under some paragraph of section 4 or section 5, then the burden is upon him 'to establish such exemption.'"

The real position of defendantsis shown by the concluding words of their short brief, which are as follows: "If this Court is of the opinion that the trial Court not requiring the defendants to introduce evidence to show that the exemption has not been established to a sufficient degree by the plaintiff, that then the cause be remanded for the purpose of permitting the defendants to be heard on that question." Plaintiff strenuously contends that because defendants failed to offer any evidence "plaintiff is entitled to a reversal of the judgment of the lower Court, and a judgment in this Court for the amount of $2,500 and interest at the rate of 6% per annum from June 17, 1930." It would be very unjust to plaintiff to remand the cause, in view of the fact that defendants' able counsel during the trial of the cause admitted that plaintiff's check "was paid to the Mayfair Laundry Co. for certificate of stock and that it went into the Laundry, that the Mayfair Laundry Co. got the money." Defendants, if they had any real defense to plaintiff's claim, had a full opportunity to present it in the trial court, and as plaintiff's evidence tended strongly to prove a scheme to defraud him, it would seem defendants would have then offered to make their defense. They did not see fit to do so.

The judgment of the Superior court of Cook county is reversed

right without a remedy, and if the plain meaning and purpose are not followed the remedy is practically destroyed. The law is a wholesome and necessary one. One who sells securities in this state is bound to know the nature of the same and that he is acting within the law when he sells them; and when his right to sell the securities is challenged he should have no trouble, if he has acted within the law, to justify the sale." He further said (p. 294): "But if a defendant 'relies for his defense upon any of the exemptions provided for in this act' and alleges that the securities sold were exempt, under some paragraph of section 4 or section 5, then the burden is upon him 'to establish such exemption.'"

The real position of defendants shown by the concluding words of their amicus brief, which are as follows: "If this Court is of the opinion that the trial court not requiring the defendants to introduce evidence to show that the exemption has not been established to a sufficient degree by the plaintiff, that this cause be remanded for the purpose of permitting the defendants to be heard on that question." Plaintiff's summary contends that because defendants failed to offer any evidence "plaintiff is entitled to a reversal of the judgment of the lower Court, and a judgment in this Court for the amount of $3,500 and interest at the rate of six per annum from June 17, 1930." It would be very unjust to plaintiff to remand the cause, in view of the fact that defendants' able counsel during the trial of the cause admitted that plaintiff's check "was paid to the Mayflr Laundry Co. for securities of stock and that it went into the laundry, that the Mayflr Laundry Co. got the money." Defendants, if they had any real defense to plaintiff's claim, had a full opportunity to present it in the trial court, and as plaintiff's evidence tended strongly to prove a scheme to defraud him, it would seem defendants would have been offered to make their defense. They did not see fit to do so.

The judgment of the superior court of Cook county is reversed

and judgment will be entered here in favor of plaintiff (appellant) and against defendants in the sum of $2,500 and interest at the rate of five per cent per annum from June 17, 1930.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF AND AGAINST DEFENDANTS FOR $2,500 AND INTEREST.

Sullivan and Friend, JJ., concur.

and judgment will be entered here in favor of plaintiff (appellant) and against defendants in the sum of $2,500 and interest at the rate of five per cent per annum from June 17, 1944.

JUDGMENT REVERSED, AND JUDGMENT HERE FOR PLAINTIFF AND AGAINST DEFENDANTS FOR $2,500 AND INTEREST.

Sullivan and Friend, JJ., concur.

40587

ECONOMY PLUMBING AND HEATING CO., INC., a Corporation,
Appellee,

v.

FRANK BURMAN, A. GREENBERG and 163-165 N. CENTRAL AVE. BUILDING, INC., a Corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

300 I.A. 607[3]

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury there was a finding for plaintiff and against defendants in the sum of $307.73. Defendants appeal from a judgment entered upon the finding.

Plaintiff's verified statement of claim is as follows: "1. That on or about May 5, 1936, defendants were then the owners, lessors and * * * in charge of the management and operation of the premises located at 165 N. Central Avenue, Chicago, Illinois. 2. That on or about said date they and each of them requested plaintiff to perform the following work on the premises aforedescribed: Repair heater boiler. Furnish and install new boiler tube. Install new submerged water heaters. Replace metal gaskets on jets between upper and lower sections of boiler. Replace corroded flange union gaskets in 6" header. Weld leaky stay bolts of boiler. 3. That thereafter plaintiff furnished and installed said work and material above listed in a good workmanlike manner, and defendants then and there agreed to pay for said work the sum of $307.73. 4. That plaintiff has frequently demanded payment of said defendants in said amount but they have failed and refused to pay said sum of $307.73 or any part thereof. Wherefore plaintiff brings this suit in the sum of $350.00." Thereafter plaintiff was allowed to file a verified amendment to the statement of claim, which was, in substance, the

MR. PRESIDING JUSTICE MCAULAY DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury there was a finding for plaintiff and against defendants in the sum of $307.73. Defendants appeal from a judgment entered upon the finding.

Plaintiff's verified statement of claim is as follows:

"1. That on or about May 5, 1926, defendants were then the owners, lessors and * * * in charge of the management and operation of the premises located at 165 E. Central Avenue, Chicago, Illinois. 2. That on or about said date they and each of them requested plaintiff to perform the following work on the premises aforedescribed: Repair heater boiler. Furnish and install new boiler tube. Install new submerged water heaters. Replace metal gaskets on jets between upper and lower sections of boiler. Replace corroded flange union gaskets in 6" header. Weld leaky stay bolts of boiler. 3. That thereafter plaintiff furnished and installed said work and material above listed in a good workmanlike manner, and defendants then and there agreed to pay for said work the sum of $307.73. 4. That plaintiff has frequently demanded payment of said defendants in said amount but they have failed and refused to pay said sum of $307.73 or any part thereof. Therefore plaintiff brings this suit in the sum of $300.00." Thereafter plaintiff was allowed to file a verified amendment to the statement of claim, which was, in substance, the

same as the original statement of claim save that it alleged that "the reasonable value of said work, labor and material furnished on or about said time at said place, amounts to $307.73."

The verified defense admits that defendants were the owners, lessors and operators in charge of the management and operation of the premises in question; denies the allegations contained in paragraph 2 of plaintiff's statement of claim, and alleges that plaintiff and defendants entered into the following written contract:

"April 22nd, 1936

"Dr. Frank P. Burman,
"3500 S. Halsted Street,
"Chicago, Ill.

"Re: 165 N. Central Avenue.

"Dear Sir:

"We have examined the heating plant in above building with reference to making the necessary repairs and submit the following proposal:

"We will replace the six (6) jet gaskets which connects the upper and lower sections of the #616 Pacific Boiler.

"We will replace one new flue which is leaking very badly. We will furnish and install one new packing gland which is split on the 2 1/2" return valve and we will replace leaky gasket on flange union at steam main as same is dripping on boiler covering and ruining same.

"We will do the above work in a complete and satisfactory manner, for the sum of ($55.00) Fifty-five Dollars.

"There is another item that should be taken care of and same will save you 10% of your fuel bill and that is changing the oil pre-heater which is connected wrong. This should be reconnected to a new location which will increase the efficiency of the oil burner. We will make this change for the sum of ($25.00) Twenty-five Dollars.

"Trusting that we may be of service to you again, we are

"Very truly yours,
"ECONOMY PLUMBING & HEATING CO.
"By Chas. M. Ross

"CMR:IB"

The defense denies that defendants agreed to pay $307.73, and alleges that $55, the amount specified in said written contract, was all that they agreed and promised to pay; alleges that plaintiff failed to perform the said written contract and that defendants were damaged in excess of the contract price of $55. Defendants filed a counter-

same as the original statement of claim save that it alleged that "the reasonable value of said work, labor and material furnished on or about said time at said place, amounts to $307.72."

The verified defense admits that defendants are the owners, lessors and operators in charge of the management and operation of the premises in question; denies the allegations contained in paragraph 2 of plaintiff's statement of claim, and alleges that plaintiff and defendants entered into the following written contract:

"April 22nd, 1936

"Dr. Frank T. Bunnen,
"3500 S. Halsted Street,
"Chicago, Ill.

"Re: 165 E. Pentral Avenue.

"Dear Sir:

"We have examined the heating plant in above building with reference to making the necessary repairs and submit the following proposal:

"We will replace the six (6) jet gaskets which connects the upper and lower sections of the Pacific Boiler.

"We will replace one new line which is leaking very badly. We will furnish and install one new packing gland which is split on the 2 1/2" return valve and we will replace leaky gasket on flange union at steam main as same is dripping on boiler covering and ruining same.

"We will do the above work in a complete and satisfactory manner, for the sum of ($25.00) Fifty-five Dollars.

"There is another item that should be taken care of and same will save you 10% of your fuel bill and that is changing the oil pre-heater which is connected wrong. This should be reconnected to a new location which will increase the efficiency of the oil burner. We will make this change for the sum of ($25.00) Twenty-five Dollars.

"Trusting that we may be of service to you again, we are

"Very truly yours,
"ECONOMY PLUMBING & HEATING CO.
"By Chas. M. Ross

"CMR:LB"

The defense denies that defendants agreed to pay $307.72, and alleges that $55, the amount specified in said written contract, was all that they agreed and promised to pay; alleges that plaintiff failed to perform the said written contract and that defendants were damaged in excess of the contract price of $55. Defendants filed a counter-

claim, which was stricken; also an amended counterclaim, which was stricken; and leave was given them to file a further amended counterclaim within ten days, but no further counterclaim was filed.

The bill rendered by plaintiff to defendants is as follows:

"May 15th, 1936

"Dr. Frank Burman,
"3500 S. Halsted Street.

"Re: 165 N. Central Avenue

"Repaired heating boiler.
"Furnished and installed new boiler tube.
"Installed new submerged water heaters.
"Replaced metal gaskets on jets between upper and lower sections of boiler.
"Replaced corroded flange union gaskets in 6" header.
"Welded leaky stay bolts of boiler.

"Heaters		$140.00	
"Pipe and fittings		14.50	
"64 hours labor	$1.50 hr.	96.00	
		$250.50	
"plus 10% profit and overhead		25.05	
		$275.55	
"plus 10 insurance		27.55	
		$303.10	
	"Occup. Tax	4.63	
			$307.73"

There are no controverted questions of law in the case. Defendants contend that they orally accepted the proposal dated April 22, 1936, and that the written proposal and acceptance constituted the sole contract between the parties, and they cite the established rule that "writings showing, upon inspection, a complete legal obligation, without uncertainty or ambiguity as to the object and extent of the agreement, are conclusively presumed to include the entire agreement of the parties, and the omission of any point which might have been embodied does not justify admission of parol evidence." Defendants call our attention to such cases as Telluride Power Co. v. Crane Co., 208 Ill. 218, wherein the plaintiffs relied on written agreements which defendants sought to qualify or modify by parol evidence. In the instant case plaintiff did not plead a written contract nor attempt to prove one. Plaintiff contends that the written proposal enumerates the specific work that was to be done for $55, and that it

claim, which was stricken; also an amended counterclaim, which was stricken; and leave was given them to file a further amended counterclaim within ten days, but no further counterclaim was filed.

The bill rendered by plaintiff to defendants is as follows:

"May 1st, 1936

"Dr. Frank Burman,
"3300 S. Halsted street.

"Mar. 165 S. Central Avenue

"Replaced heating boiler.
"Furnished and installed new boiler tube.
"Installed new submerged water heaters.
"Replaced metal gasket on jets between upper and lower sections of boiler.
"Replaced corroded flange union nipples in 6" header.
"Welded leaky stay bolts of boiler.

"heaters		$140.00
"Pipe and fittings		14.50
"64 hours labor	1.50 hr.	96.00
		$250.50
"plus 10% profit and overhead		25.05
		$275.55
"plus 10 insurance		27.55
		$303.10
"Comp. Tax		4.63
		$307.73"

There are no controverted questions of law in the case. Defendants contend that they orally accepted the proposal dated April 22, 1936, and that the written proposal and acceptance constituted the sole contract between the parties, and they cite the established rule that "writings showing, upon inspection, a complete legal obligation, without uncertainty or ambiguity as to the object and extent of the agreement, are conclusively presumed to include the entire agreement of the parties, and the omission of any point which might have been embodied does not justify admission of parol evidence." Defendants call our attention to such cases as Tallmadge Power Co. v. Crane Co., 208 Ill. 218, wherein the plaintiffs relied on written agreements which defendants sought to qualify or modify by parol evidence. In the instant case plaintiff did not plead a written contract nor attempt to prove one. Plaintiff contends that the written proposal enumerates the specific work that was to be done for $255, and that it

does not include any work in connection with the hot water heaters. Mr. Ross, an officer of plaintiff company, testified that the proposal was never accepted by Dr. Burman; that several days after it was sent "Dr. Burman called me on the telephone at the office and told me that he wanted to see me on the premises relative to an inability to get hot water. He said that the tenants were all complaining and threatening to move out. Q. Now, Mr. Ross, I will ask you if any of the work set forth in the proposal touches upon the question of hot water? A. No. Q. All right, just go ahead and tell us what happened? A. I met him on the premises about a week after that, down in the boiler room of the apartment building and he was telling me about the trouble he was having with the hot water and I told him after an inspection that he would have to install new heaters, because there was a coating of lime on the outside as well as on the inside of the coils, and that they should be replaced with larger heaters. Q. Tell us what you noticed about the heaters? A. Well, they were under-sized to start with. They had been in there for eight or ten years and had never been cleaned or had a flushing. They had never been taken out and there was considerable sediment and coating to be removed from the tubes. Q. What about the position of the tubes? A. The two tubes on the side were not giving service at all and I recommended that he install larger ones. Q. Did you have any discussion with Dr. Burman as to what your charges would be for all the work and materials furnished? A. No. Q. Did you at any time ever discuss with him the question of what the charges would be with reference to the work done? A. I told him that I could not give him any idea about it until we had removed it and could see the contents of the heater. * * * Q. What did he say with reference to your recommendation regarding the changing of the tubes and coils? A. He said to go ahead. Q. How soon after that conversation did you start work there? A. Several days afterwards. Q. Did you sub-let any of that work? A. Yes, we did. Q. Which work did you sub-let and to whom? A. We sub-let the work on the

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Q. Did you sub-let any of that work? A. Yes, we did. Q. Which
work did you sub-let and to whom? A. We sub-let the work on the

submerged heaters, the removing of the heaters and installation of the new heaters, and the circulation gasket on top of the steam heater. Q. To whom did you sublet that work? A. To the Central Welding and Boiler Repair Company. Q. Did they do any work on the premises? A. Yes, they did." Upon cross-examination the following occurred: "Q. Well, you said that you met Dr. Burman two days after you mailed the proposal? A. I said several days, two or three days. Q. Now then, was that in response to your proposal? A. No, sir. Q. Where did you see him a few days later? A. In the boiler room at 165 North Central avenue. Q. Was that where the intended job was located? A. Yes. Q. Did he talk to you about the proposal you had mailed him? A. No, sir. Q. Is it not a fact that he told you to go ahead with your job? The Court: What was the entire conversation? A. He met me in the boiler room and told me about his water problem. I said, 'Give me this job and I will take the tubes out and if I find they are too small, or badly coated with lime, then I will replace them.' He said to go ahead. Q. Did he have the written proposal with him at the time? A. No, sir. Q. I want to know why didn't you send him another proposal, if that was the case? A. He wanted me to give him a price there and I told him I could not give him a price until we took the heaters out and see what condition they were in and if I found them in such a condition that I could replace them I would go ahead and charge him ten per cent over my overhead." The witness also testified, on direct, that plaintiff received a bill from Central Welding and Boiler Repair Company for the work they did on the premises; that the amount of the bill was $157.55, which plaintiff paid; that the total charge made by plaintiff was very reasonable; that "we installed new tubes for the ones that were leaking, new heaters were put in, a side-armed jet, and gaskets. * * * We changed the circulating piping between the tank and the heater." Defendants made no effort to show that the work in question was not furnished, nor that it was notreasonably worth

submerged heaters, the removing of the heaters and installation of the new heaters, and the circulation pipes on top of the steam heater. Q. To whom did you submit that work? A. To the Central Welding and Boiler Repair Company. Q. Did they do any work on the premises? A. Yes, they did." Upon cross-examination the following occurred: "Q. Well, you said that you met Mr. Bunnen two days after you mailed the proposal? A. I said several days, two or three days. Q. Now then, was that in response to your proposal? A. No, sir. Q. Where did you see him a few days later? A. In the boiler room at 165 North Central avenue. Q. Was that where the intended job was located? A. Yes. Q. Did he talk to you about the proposal you had mailed him? A. No, sir. Q. Is it not a fact that he told you to go ahead with your job? The Court: What was the entire conversation? A. He met me in the boiler room and told me about his water problem. I said, 'Give me this job and I will take the tubes out and if I find they are too small, or badly coated with lime, then I will replace them.' He said to go ahead. Q. Did he have the written proposal with him at the time? A. No, sir. Q. I want to know why didn't you send him another proposal, if that was the case? A. He wanted me to give him a price there and I told him I could not give him a price until we took the heaters out and see what condition they were in and if I found them in such a condition that I could replace them I would go ahead and charge him ten per cent over my overhead." The witness also testified, on direct, that plaintiff received a bill from Central Welding and Boiler Repair Company for the work they did on the premises; that the amount of the bill was $167.55, which plaintiff paid; that the total charge made by plaintiff was very reasonable; that "we installed new tubes for the ones that were leaking, new heaters were put in, a side-armed jet, and gaskets. * * * changed the circulating piping between the tank and the heater." Defendants made no effort to show that the work in question was not furnished, nor that it was not reasonably worth

the amount charged by plaintiff for the same. Abram M. Greenberg, defendant, who was associated with Dr. Burman in the operation of the building, testified that "when I came back from the bank, they had the entire boiler and a set of new heaters in there." Defendants never rejected this work nor ordered the removal of the same. Ross testified that several weeks after plaintiff had billed defendants he talked with Dr. Burman about the bill at the latter's office. The witness testified as follows as to the conversation: "Q. What did you say to him and what did he say to you in that conversation? A. Well, he wanted to know if I could knock off ten per cent. He said he did not think it would run that much. I said, 'All right, I will do it.' Then after a little further talk he said to come back a couple of days later and he would give me a check. When I finally did reach him, he told me to go and see his lawyer." Dr. Burman testified that after he received the written proposal from plaintiff he called up plaintiff's office and told Ross that he was the lowest bidder and "can go ahead with the work," that he did not see Ross until about three or four months after the job was given and the bill had been rendered; that he never talked with him about the payment of the bill but told him that he would have to take up the matter of the bill with the bondholders' committee.

Narrowed down, the defense amounts to this: That defendants orally accepted the written proposal, that they had no further understanding with plaintiff, and that therefore all that the latter could claim of them was the $55 mentioned in the written proposal. Defendants argue that "all the plaintiff wanted was to get one foot in the premises and then it felt that it could make its charge as it so pleased or desired;" that "it all simmers down to the fact that the plaintiff endeavored to gamble with this Court and did gamble successfully with the Court below. It felt that it could always get the contract price and it would take a chance on the plan." The trial court gave no weight to this argument of defendants, and we are satisfied

the amount charged by plaintiff for the work. Orrin H. Greenberg, defendant, who was associated with Dr. Burman in the operation of the building, testified that "when I came back from the bank, they had the entire boiler and a set of new heaters in there." Defendants never rejected this work nor ordered the removal of the same. Ross testified that several weeks after plaintiff had billed defendants he talked with Dr. Burman about the bill at the latter's office. The witness testified as follows as to the conversation: "Q. What did you say to him and what did he say to you in that conversation? A. Well, he wanted to know if I could knock off ten per cent. He said he did not think it would run that much. I said, 'All right, I will do it.' Then after a little further talk he said to come back a couple of days later and he would give me a check. When I finally did report him, he told me to go and see his lawyer." Dr. Burman testified that after he received the written proposal from plaintiff he called up plaintiff's office and told Ross that he was the lowest bidder and "can go ahead with the work," that he did not see Ross until about three or four months after the job was given and the bill had been rendered; that he never talked with him about the payment of the bill but told him that he would have to take up the matter of the bill with the boardbaders' committee.

Narrowed down, the defense amounts to this: That defendants orally accepted the written proposal, that they had no further understanding with plaintiff, and that therefore all that the latter could claim of them was the $35 mentioned in the written proposal. Defendants argue that "all the plaintiff wanted was to get one foot in the premises and then it felt that it could make its charge or it so pleased or desired;" that "it all amounts down to the fact that the plaintiff endeavored to contract with this Court and did make successfully with the Court below. It felt that it could always get the contract price and it would take a chance on the plan." The trial court gave no weight to this argument of defendants, and we are satisfied

that he was justified in so doing. Plaintiff sued upon an oral agreement, and the question as to whether or not there was such an agreement for the work sued for was a matter to be determined from the evidence. It is agreed that all negotiations in reference to the work took place between Mr. Ross and Dr. Burman, both of whom testified.

This case was tried without a jury, and the finding of the trial court is entitled, on review, to the same weight as the verdict of a jury, and where the evidence is contradictory, such finding will not be reversed, unless it is contrary to the manifest weight of the evidence. We are satisfied that defendants have failed to show that the finding of the trial court is contrary to the manifest weight of the evidence. Indeed, there are certain mountain peaks in the evidence that fully justified the trial court in adopting plaintiff's theory of fact. The circumstance that plaintiff sublet the part of the work pertaining to the hot water system to the Central Welding and Boiler Repair Company and paid that company $157.55, is very significant; also the further circumstance that defendants retained the set of new heaters.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

that he was justified in so doing. Plaintiff sued upon an oral agreement, and the question as to whether or not there was such an agreement for the work sued for was a matter to be determined from the evidence. It is agreed that all negotiations in reference to the work took place between Mr. Hoss and Mr. Burman, both of whom testified.

This case was tried without a jury, and the finding of the trial court is entitled, on review, to the same weight as the verdict of a jury, and where the evidence is contradictory, such finding will not be reversed, unless it is contrary to the manifest weight of the evidence. We are satisfied that defendants have failed to show that the finding of the trial court is contrary to the manifest weight of the evidence. Indeed, there are certain mountain peaks in the evidence that fully justified the trial court in adopting plaintiff's theory of fact. The circumstance that plaintiff sublet the part of the work pertaining to the hot water system to the Central Heating and Boiler Repair Company and paid that company $1,[illegible], is very significant; also the further circumstance that defendants retained the set of new heaters.

The judgment of the municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Thiend, JJ., concur.

40345

CLAUDE WAYLAND,
Appellant,

v.

CITY OF CHICAGO, a municipal corporation,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

300 I.A. 608

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

November 8, 1935, Claude Wayland, plaintiff, was injured as the result of a fall on an allegedly defective sidewalk on Archer avenue, Chicago. He brought suit against the city to recover damages, and had a verdict for $35,000. The court granted defendant a new trial. The cause was afterward retried, resulting in a verdict and judgment for defendant, and plaintiff has prosecuted this appeal for reversal of that judgment.

The accident is alleged to have occurred at about a quarter past six o'clock November 8, 1935, when plaintiff, while walking in a northeasterly direction on Archer avenue, stubbed his toe or stepped into a hole in the sidewalk in front of the premises known as 4157 Archer avenue and was thrown forward on the walk sustaining severe injuries.

As ground for reversal it is urged that the verdict of the jury was manifestly against the weight of the evidence; that improper conduct and remarks of counsel and ofthe court, made during the trial, prejudiced plaintiff's case so as to produce a verdict in favor of defendant; and that the court erroneously instructed the jury in several respects.

With reference to the charge that defendant's counsel prejudiced plaintiff's case by his conduct and remarks made during the trial and in his argument to the jury, the record discloses the following cir-

46345

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Appellant,

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CITY OF CHICAGO, a municipal corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
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MR. JUSTICE WILLIAM MILLEMANN THE OPINION OF THE COURT.

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The accident is alleged to have occurred at about a quarter past six o'clock November 8, 1930, when plaintiff, while walking in a northwesterly direction on Archer avenue, stubbed his toe or stepped into a hole in the sidewalk in front of the premises known as 4157 Archer avenue and was thrown forward on the walk sustaining severe injuries.

As ground for reversal it is urged that the verdict of the jury was manifestly against the weight of the evidence; that improper conduct and remarks of counsel and of the court, made during the trial, prejudiced plaintiff's case so as to produce a verdict in favor of defendant; and that the court erroneously instructed the jury in several respects.

With reference to the charge that defendant's counsel prejudiced plaintiff's case by his conduct and remarks made during the trial and in his argument to the jury, the record discloses the following cir-

cumstances: With no evidence in the record to support it, defendant's counsel made the statement in his argument to the jury that "when you were examined Mr. Zazove told you that I was a former partner of W. W. Smith and Clarence Darrow. I don't know why he told you that. Maybe to let you know that at one time, with Clarence Darrow, I defended men who were charged with crime, for their liberty and their life. I, too, was a prosecutor for this County. At the outset of this trial I wondered why I, who had never had the experience before in my life in the trial of this kind of a case, was assigned to this particular case, but after getting into it and after listening to the testimony of the witnesses in this case, probably the Corporation Counsel of the City of Chicago felt that this case required the services of a criminal lawyer. *** And I want to say to you men at the outset, that by the widest stretch of the imagination you would not, and could not expect that the plaintiff in a civil suit in this country would bring to you under oath the type of testimony that they submitted here for your approval. You talk about the criminal law, I say they are guilty of obtaining by means of false pretensions, they are conspiring against the City of Chicago to get money from the City of Chicago." Mr. Zazove, who was conducting the trial for plaintiff in association with another counsel, objected to these remarks as being highly prejudicial, and thereupon defendant's counsel emphasized the statement by saying, "I charge it." The court sustained the objection, and directed the jury to disregard the remarks.

In another part of his argument defendant's counsel made the following statement: "If this case were being tried in the Criminal Court of Cook County and the State would produce the type of evidence that they have produced here and ask twelve men in the jury box to take away the liberty or the life of a man on that testimony, regardless of the difference in the proof, the jury would not be out five minutes but would come in and return a verdict of not guilty, and it is true, and

cumstances: With no evidence in the record to support it, defendant's counsel made the statement in his argument to the jury that "When you were examined Mr. Zarove told you that I was a former partner of ... Smith and Clarence Darrow. I don't know why he told you that. Maybe to let you know that at one time, with Clarence Darrow, I defended men who were charged with crime, for their liberty and their life. I, too, was a prosecutor for this County. At the outset of this trial I wondered why I, who had never had the experience before in my life in the trial of this kind of a case, was assigned to this particular case, but after getting into it and after listening to the testimony of the witnesses in this case, probably the Corporation Counsel of the City of Chicago felt that this case required the services of a criminal lawyer. ... And I want to say to you men at the outset, that by the widest stretch of the imagination you could not, and could not expect that the plaintiff in a civil suit in this country would bring to you under oath the type of testimony that they submitted here for your approval. You talk about the criminal law, I say they are guilty of obtaining by means of false pretenses. They are conspiring against the City of Chicago to get money from the City of Chicago." Mr. Zarove, who was conducting the trial for plaintiff in association with another counsel, objected to these remarks as being highly prejudicial, and thereupon defendant's counsel emphasized the statement by saying, "I charge it." The court sustained the objection, and directed the jury to disregard the remarks.

In another part of his argument defendant's counsel made the following statement: "If this case were being tried in the Criminal Court of Cook County and the state would produce the type of evidence that they have produced here and ask twelve men in the jury box to take away the liberty or the life of a man on that testimony, regardless of the difference in the proof, the jury would not be out five minutes but would come in and return a verdict of not guilty, and it is true, and

the jurors here are no different than the jurors there. *** For a few paltry dollars men will swear their souls away, their lives away, they kill, cheat, and everything else for money. Barnish tried to tell you that other people fell there, but I impeached him. I charge it to Zazove, to Heitz, and the other men in this case. What is the purpose of it, money, money, money, money. You see it running through this case. You are citizens of the City of Chicago and they are asking you to pay that money. Hasn't the City of Chicago the same rights as others, as Zazove, and his investigators that we call chasers."

In another part of his argument defendant's counsel made the following statement, without any evidence to support it: "Something happened to Wayland before he got to 4157. It could have happened in the store, he could have slipped downstairs and got the back of his head against a sharp step; that would do it. They have to prove it by a preponderance of all the evidence of the case, and if there is a doubt in your mind, you have to resolve that doubt in favor of the City of Chicago."

The simple issues presented to the jury were whether a defect in the sidewalk rendered the city liable for damages and the extent of plaintiff's injuries. Plaintiff asserts that defendant produced a large number of police officers to testify; that their testimony was in no sense damaging to plaintiff's cause, but that their appearance in connection with the attorney's argument incited prejudice and passion on the part of the jurors. This statement is made in support of the contention that defendant's counsel sought by his remarks to draw an analogy between the trial of this cause and a criminal proceeding, and to create the impression that plaintiff, Zazove, his associate and investigators were "guilty of obtaining by means of false pretensions" and were "conspiring against the City of Chicago to get money from the City of Chicago." Counsel's argument to the jury was entirely unwarranted and was not based upon any evi-

the jurors here are no different than the jurors there. *** For a few paltry dollars men will swear their souls away, their lives away, they kill, steal, and everything else for money. Hamlin tried to tell you that other people fell there, but I impeached him. I charge it to Zanove, to Seitz, and the other men in this case. What is the purpose of it, money, money, money, money. You see it running through this case. You are citizens of the City of Chicago and they are asking you to pay that money. Hasn't the City of Chicago the same rights as others, as Zanove, and his investigators that we call chasers."

In another part of his argument defendant's counsel made the following statement, without any evidence to support it: "Something happened to Hyland before he got to 4107. It could have happened in the store, he could have slipped downstairs and got the book of his head against a sharp step; that would do it. They have to prove it by a preponderance of all the evidence of the case, and if there is a doubt in your mind, you have to resolve that doubt in favor of the City of Chicago."

The simple issues presented to the jury were whether a defect in the sidewalk rendered the city liable for damages and the extent of plaintiff's injuries. Plaintiff asserts that defendant produced a large number of police officers to testify; that their testimony was in no sense damaging to plaintiff's cause, but that their appearance in connection with the attorney's argument incited prejudice and passion on the part of the jurors. This statement is made in support of the contention that defendant's counsel sought by his remarks to draw an analogy between the trial of this cause and a criminal proceeding, and to create the impression that plaintiff, Zanove, his associate and investigators were "guilty of obtaining by means of false pretentions" and were "conspiring against the City of Chicago to get money from the City of Chicago." Counsel's argument to the jury was entirely unwarranted and was not based upon any evi-

dence to support it; nor could these remarks be regarded as justifiable inferences from any proof adduced upon the hearing. Defendant's counsel argues that his remarks to the jury were justified under the rule laid down in Commonwealth Electric Co. v. Rose, 214 Ill. 545. It was there said (p. 561): "Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances." (Italics ours.) Plaintiff finds no fault with the rule emunciated in the foregoing decision, but says that there was no evidence to warrant so vicious an attack upon the motives, conduct or credibility of plaintiff's counsel or witnesses. We have found no evidence in the record to justify defendant's counsel in invoking the rule for which the city contends.

It is unnecessary to review at length the voluminous testimony adduced upon the trial, but plaintiff's proof may be briefly summarized as follows: Wayland testified that he was 54 years of age, employed as manager of the Scott Burr Stores, a subsidiary of Butler Brothers, with which concern he had been associated since 1930, and that he earned an average of $3,500 a year. He stated that while walking northeast on Archer avenue on the evening in question, he stepped in a hole in the sidewalk, his foot caught, causing his body to twist, and that he threw out his right hand and fell, striking his hand and head on the sidewalk about the same time. There were several witnesses who saw the accident and testified for plaintiff. Defendant offered no eyewitnesses at all, but presented five police officers who testified concerning their investigation subsequent to the occurrence, and a father and daughter, who lived at 4157 Archer avenue, neither of whom saw the accident. Some of the witnesses said that plaintiff fell forward on his stomach, and defendant's counsel argued to the jury that this could not have

dence to support his contention that because he engaged in justifiable interference from any proof adduced upon the matter, defendant's counsel argued that his conduct to the jury was justified under the rule laid down in Commonwealth Electric Co. v. Ross, 214 Ill. 546. It was there said (p. 551): "Counsel may argue the conduct of the parties, and imputed, express, implied, or ordinary motives, so far as they are developed in evidence, or affect the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or inaccuracy of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances." (Italics ours.) Plaintiff finds no fault with the rule enunciated in the foregoing decision, but says that there was no evidence to warrant no violence or attack upon the motives, conduct or credibility of plaintiff's counsel or witnesses. We have found no evidence in the record to justify defendant's counsel in inviting the rule for which the city contends.

It is unnecessary to review at length the voluminous testimony adduced upon the trial, but plaintiff's proof may be briefly summarized as follows: Reyland testified that he was 54 years of age, employed as manager of the Sears Store, a subsidiary of Butler Brothers, with which company he had been associated since 1907, and that he earned an average of $4,000 a year. He stated that while walking northbound on Ashland avenue on the evening in question, he stepped in a hole in the sidewalk, his foot slipped, sending his body to twist, and that he threw out his right hand and fell, striking his head and hand on the sidewalk about the same time. There were several witnesses who saw the accident and testified for plaintiff. Defendant offered no eyewitnesses at all, but produced five police officers who testified concerning their investigation subsequent to the occurrence, and a father and daughter, who lived at 4157 Ashland avenue, neither of whom saw the accident. None of the witnesses said that plaintiff fell forward on his ankle, and defendant's counsel argued to the jury that this would not have

produced a laceration and fracture on the back of the head, and inferentially defendant's counsel went so far as to suggest to the jury that the nature of the skull injury could have been produced only by contact with a sharp edge, such as the corner of a stair, and that he might have fallen down the stairs in the store where he worked, and not on the sidewalk, as he claimed. In view of the testimony of the eyewitnesses, there was no room for any such argument. Defendant evidently recognized the location of the accident, because the police officers who examined the sidewalk shortly after the occurrence testified as to the condition thereof, and the suggestion of counsel that "something happened to Wayland before he got to 4157, it may have happened in the store, he could have slipped downstairs and got the back of his head against a sharp step; that would do it," was not warranted by the evidence.

Moreover, it was argued to the jury that plaintiff had to prove his case not by a preponderance of the evidence, but "if there is a doubt in your mind, you have to resolve that doubt in favor of the City of Chicago." This is contrary to fixed principles of law, and urged the jury to apply the reasonable doubt rule invoked in criminal cases in a civil suit for damages. That sort of argument was harmful, prejudicial to plaintiff, and should not have been permitted.

There are also charges that the court was guilty of improper conduct to the prejudice of plaintiff, and several instances are quoted from the record indicating what plaintiff's counsel asserts was a hostile attitude on the part of the court. We think it unnecessary to discuss these charges, but merely reiterate what has often been said by the courts, that the judge's conduct in the presence of the jury in unnecessarily reprimanding plaintiff's counsel may indicate bias in the case and should be avoided. This is particularly true in the trial of a cause where the evidence is sharply conflicting and where the jury may, from the court's attitude, gain the impression

produced a laceration and fracture on the back of the head, and interrentially defendant's counsel went so far as to suggest to the jury that the nature of the small injury could have been produced only by contact with a sharp edge, such as the corner of a stair, and that he might have fallen down the stairs in the store where he worked, and not on the sidewalk, as he claimed. In view of the testimony of the eyewitnesses, there was no room for any such argument. Defendant evidently recognized the location of the accident, because the police officers who examined the sidewalk shortly after the occurrence testified as to the condition thereof, and the suggestion of counsel that "something happened to Wyland before he got to 4127, it may have happened in the store, he could have slipped downstairs and got the back of his head against a sharp edge; that would do it," was not warranted by the evidence.

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that the judge has an opinion one way or another as to the credibility of the witnesses or as to the merits of the cause.

Complaint is made that the court erred in charging the jury on several important phases of the case. It is urged that instruction No. 10, tendered by defendant, was improper. By that instruction the court charged the jury that plaintiff was required by law to establish his case by a preponderance of the evidence before he could recover, and that if he had not so established his case, or if the evidence was evenly balanced so that the jury were in doubt and unable to say on which side the evidence preponderated, the verdict should be not guilty. This form of instruction was held to constitute reversible error in Hurzon v. Schmitz, 262 Ill. App. 337, wherein the word "established" was likewise used in a similar way. The court there said (p. 339): "In a civil case a plaintiff is entitled to recover if the evidence creates probabilities in his favor, - that is, that the weight of the evidence inclines to his side. (Crabtree v. Reed, 50 Ill. 206.) A plaintiff is not required to establish any elements essential to a recovery. (McMasters v. Grand Trunk Ry. Co., 155 Ill. App. 648.) The word 'establish' ordinarily means to settle finally, to fix unalterably. It is not necessary in a civil action that any fact should be established - that is, settled certainly, or fixed permanently - which may have been uncertain, doubtful or disputed before." And after citing numerous cases, the court concluded (p. 340): "The instruction placed a higher burden upon appellant than the law required. It was very much like telling the jury that appellant was required to prove the facts stated to the satisfaction of the jury or beyond a reasonable doubt. Instructions requiring a plaintiff to prove his case by a clear preponderance of the evidence, to produce evidence to satisfy the jury, or to prove certain facts to the satisfaction of the jury, have been frequently condemned. (Crabtree v. Reed, 50 Ill. 206; Rolfe v.

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Complaint is made that the court erred in charging the jury on several important phases of the case. It is urged that instruction No. 10, tendered by defendant, was improper. By that instruction the court charged the jury that plaintiff was required by law to establish his case by a preponderance of the evidence before he could recover, and that if he had not so established his case, or if the evidence was evenly balanced so that the jury were in doubt and unable to say on which side the evidence preponderated, the verdict should be not guilty. This form of instruction was held to constitute reversible error in Burson v. Coinsite, 261 Ill. App. 327, wherein the word "established" was likewise used in a similar way. The court there said (p. 332): "In a civil case a plaintiff is entitled to recover if the evidence creates probabilities in his favor, - that is, that the weight of the evidence inclines to his side. (Crabtree v. Reed, 30 Ill. 206.) A plaintiff is not required to establish any elements essential to a recovery. (McMasters v. Grand Trunk Ry. Co., 155 Ill. App. 648.) The word 'establish' ordinarily means to settle firmly, to fix unalterably. It is not necessary in a civil action that any fact should be established - that is, settled certainly, or fixed permanently - which may have been uncertain, doubtful or disputed before." And after citing numerous cases, the court concluded (p. 340): "The instruction placed a higher burden upon appellant than the law required. It was very much like telling the jury that appellant was required to prove the facts stated to the satisfaction of the jury or beyond a reasonable doubt. Instructions requiring a plaintiff to prove his case by a clear preponderance of the evidence, to produce evidence to satisfy the jury, or to prove certain facts to the satisfaction of the jury, have been frequently condemned. (Crabtree v. Reed, 30 Ill. 206; Holle v.

Rich, 149 Ill. 436; Sonnemann v. Mertz, 221 Ill. 362; Teter v. Spooner, 305 Ill. 198.)

Complaint is also made of instruction No. 11-b, tendered by defendant and given by the court. This instruction was as follows: "The court instructs you as a matter of law that if you find from all the evidence in this case that the plaintiff's injuries are not the result of any negligence on the part of the City of Chicago in allowing or permitting any hole, dugout, or depression, to be or remain in and upon the sidewalk here in question, but that the plaintiff's injuries, if any were sustained, resulted solely and exclusively from the existence of a difference in level between two slabs of the sidewalk here in question, then in such case I charge you, as a matter of law, that the City of Chicago would not be liable for any injuries sustained as the result of such mere difference in level." The rule laid down by the court in this instruction is erroneous, and inasmuch as there was a sharp conflict in the evidence as to the condition of the sidewalk such an instruction might well have produced the verdict in favor of defendant. The issues of negligence on which plaintiff tried the cause were threefold: (1) The existence of the hole, dugout, or depression; (2) the insecure and dangerous condition; and (3) the disrepair of the sidewalk. The evidence of substantially all the witnesses disclosed that there was a depression in the walk, whereby one slab was lower than an adjoining one. Plaintiff argues that this elevation rendered the walk insecure. There was also evidence that the walk had been broken in places and filled with dirt. Notwithstanding these circumstances, the court charged the jury as a matter of law that the city would not be liable if the accident and injuries resulted solely from the existence of a difference in level between two concrete slabs in the sidewalk. It is conceivable that a very dangerous situation may be created by difference in the level between slabs in a sidewalk, and that a

Rich, 149 Ill. 436; Bonnesman v. Marks, 223 Ill. 302; Tetzy v. Spooner, 305 Ill. 188.)

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pedestrian walking briskly along the walk may stub his toe, may fall headlong and sustain injuries. In Fromme v. City of Girard, 295 Ill. App. 144, an action was brought against the city for damages sustained as the result of a fall upon a sidewalk raised above the level of an adjoining section by growing roots of trees, which defect was known to the street superintendent, and a verdict for plaintiff was sustained.

Criticism is also leveled at instructions Nos. 16 and 21, the first of which was offered by defendant and given, and the second tendered by plaintiff and refused. Since the objections to these instructions are fully discussed in his brief, we assume that upon retrial care will be taken to obviate the objectionable portions thereof.

After a careful examination of the record we have reached the conclusion that plaintiff did not receive a fair trial. A new trial was granted in the first instance because the city presented certain affidavits relative to plaintiff's conduct and that of his counsel, and not because of any question affecting the alleged liability of the city. The issues before the court and jury were simple; they involved the presentation of evidence from which the jury were called upon to find facts and determine whether defendant was liable and, if so, the question of damages. In the determination of these questions the jury were undoubtedly influenced by the prejudicial statements and arguments made, and the verdict of not guilty may well have been produced by these arguments. We are therefore of the opinion that the cause should be retried. The judgment of the Circuit court is accordingly reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

pedestrian walking briskly along the walk may stub his toe, may fall headlong and sustain injuries. In Kromme v. City of Orange, 305 Ill. App. 144, an action was brought against the city for damages sustained as the result of a fall upon a sidewalk raised above the level of an adjoining section by growing roots of trees, which defect was known to the street superintendent, and a verdict for plaintiff was sustained.

Criticism is also levelled at instructions Nos. 16 and 21, the first of which was offered by defendant and given, and the second tendered by plaintiff and refused. Since the objections to these instructions are fully discussed in his brief, we assume that upon retrial care will be taken to obviate the objectionable portions thereof.

After a careful examination of the record we have reached the conclusion that plaintiff did not receive a fair trial. A new trial was granted in the first instance because the city presented certain affidavits relative to plaintiff's conduct and that of his counsel, and not because of any question affecting the alleged liability of the city. The issues before the court and jury were simple; they involved the presentation of evidence from which the jury were called upon to find facts and determine whether defendant was liable and, if so, the question of damages. In the determination of these questions the jury were undoubtedly influenced by the prejudicial statements and arguments made, and the verdict of not guilty may well have been produced by those arguments. We are therefore of the opinion that the cause should be retried. The judgment of the Circuit court is accordingly reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Denison, P. J., and Gulliver, J., concur.

40410

JOHN E. ERICKSON,
Appellant,

v.

ARTHUR J. OLSON et al., individually and as BONDHOLDERS' PROTECTIVE COMMITTEE OF PAULINA APARTMENTS,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

13A

300 I.A. 608

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John E. Erickson, an attorney at law, brought suit in the Municipal court for attorney's fees in the amount of $650, against Arthur J. Olson, Eva Mentges, Ella J. Peetz, Emil Johnson and A. J. Roeder, individually and as Bondholders' Protective Committee of the Paulina Apartments, then under foreclosure, claiming that his services were rendered at the special instance and request of defendants, individually and as a committee. Trial was had by jury, resulting in a verdict and judgment for defendants. Plaintiff appealed.

It appears that some years prior to September, 1934, a foreclosure case was filed by J. Hilding Johnson, as trustee, against William Patterson et al., as cause No. B-270049. The defendants herein constituted a bondholders' protective committee, organized in connection with the foreclosure proceeding. The attorneys for the trustee in the foreclosure case were Urion, Bishop, Sladkey & Boutell, who were in no way associated with plaintiff.

Early in September, 1934, Roeder, one of the defendants, who had been acquainted with plaintiff, suggested to him that the committee was dissatisfied with the progress of the foreclosure case because no apparent action was being taken to bring the proceedings to a conclusion. The trustee had taken possession of the

300 I.A. 608

JOHN E. MICKSON,

Appellant,

v.

ARTHUR J. OLSON et al., individually and as BOMBHOLDERS' PROTECTIVE COMMITTEE OF FAMILIA APARTMENTS,

Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE PRIMRO DELIVERED THE OPINION OF THE COURT.

John E. Mickson, an attorney at law, brought suit in the Municipal court for attorney's fees in the amount of $650, against Arthur J. Olson, Ava Hentges, Ella J. Peets, Emil Johnson and A. J. Roeder, individually and as Bombholders' Protective Committee of the Familia Apartments, then under foreclosure, claiming that his services were rendered at the special instance and request of defendants, individually and as a committee. Trial was had by jury, resulting in a verdict and judgment for defendants. Plaintiff appealed.

It appears that some years prior to September, 1924, a foreclosure case was filed by J. Midling Johnson, as trustee, against William Pettstaen et al., as cause No. B-270 49. The defendants herein constituted a bombholders' protective committee, organized in connection with the foreclosure proceeding. The attorneys for the trustee in the foreclosure case were Union, Bishop, Blackey & Bontell, who were in no way associated with plaintiff.

Early in September, 1924, Roeder, one of the defendants, who had been acquainted with plaintiff, suggested to him that the committee was dissatisfied with the progress of the foreclosure case because no apparent action was being taken to bring the proceedings to a conclusion. The trustee had taken possession of the

premises being foreclose, was managing and collecting the rents thereof, and the committee was apparently dissatisfied with the progress being made. Notwithstanding the fact that the committee had been soliciting and accepting the deposit of bonds under a certificate of deposit purporting to have been issued under and pursuant to a definite deposit agreement, bearing date November 11, 1933, no deposit agreement had in fact been entered into. Accordingly plaintiff was invited to attend a meeting of the committee and confer with its members.

There is evidence that plaintiff familiarized himself with the problems at hand, advised the committee of the necessity of having a bondholders' deposit agreement, and rendered various other services, including the preparation of such an agreement, obtained leave of court to enter the committee's appearance in the foreclosure proceeding, filed a cross bill asking for the appointment of a receiver and other affirmative relief, and prepared answers to a questionnaire which had been sent out generally to bondholders' protective committees by the Sabath congressional committee seeking information relative to foreclosure proceedings in the United States.

There was evidence introduced on behalf of defendants that Roeder had warned plaintiff at the outset that there was no way of obtaining any fees for him unless he could devise a way of disposing of the attorneys then representing the complainant, inasmuch as the committee had no funds with which to pay an attorney, and that plaintiff would have to look only to the foreclosure proceedings for any fees that he might ultimately obtain. At the various meetings attended by plaintiff, members of the committee inquired whether he had succeeded in removing the attorneys then in charge of the foreclosure, but this apparently could not be accomplished.

Until some time in September, 1934, plaintiff made no request for fees, nor did he send defendants any statements for services rendered. Thereafter and until January, 1935, the question of fees was

premises being foreclosed, was managing and collecting the rents thereof, and the committee was apparently dissatisfied with the progress being made. Notwithstanding the fact that the committee had been soliciting and accepting the deposit of bonds under a certificate of deposit purporting to have been issued under and pursuant to a definite deposit agreement, bearing date November 11, 1933, no deposit agreement had in fact been entered into. Accordingly plaintiff was invited to attend a meeting of the committee and confer with its members.

There is evidence that plaintiff familiarized himself with the problems at hand, advised the committee of the necessity of having a bondholders' deposit agreement, and rendered various other services, including the preparation of such an agreement, obtained leave of court to enter the committee's appearance in the foreclosure proceeding, filed a cross bill seeking for the appointment of a receiver and other affirmative relief, and prepared answers to a questionnaire which had been sent out generally to bondholders' protective committees by the Sabath congressional committee seeking information relative to foreclosure proceedings in the United States.

There was evidence introduced on behalf of defendants that Toeder had warned plaintiff at the outset that there was no way of obtaining any fees for him unless he could devise a way of disposing of the attorneys then representing the complainant, inasmuch as the committee had no funds with which to pay an attorney, and that plaintiff would have to look only to the foreclosure proceedings for any fees that he might ultimately obtain. At the various meetings attended by plaintiff, members of the committee inquired whether he had succeeded in removing the attorneys then in charge of the foreclosure, but this apparently could not be accomplished.

Until some time in September, 1934, plaintiff made no request for fees, nor did he send defendants any statements for services rendered. Thereafter and until January, 1935, the question of fees was

presented for the committee's consideration at various times, as indicated by the minutes of its meetings, and ultimately plaintiff was induced to put his understanding as to fees in writing, and a letter was addressed by him to the committee, dated January 5, 1935, in which he said that for all services rendered by him to that date, including the draft of the depositary agreement, conferences and preparing answer and cross bill in the foreclosure proceeding, he had no thought of holding the committee members personally liable unless he was discharged. According to the pleadings and the evidence all the services for which fees are claimed were admittedly performed before January 5, 1935, the date on which the letter was written to the committee.

The issues of fact submitted to the jury were therefore two-fold: (1) whether plaintiff had been employed by the committee, and (2) whether he had been discharged. Defendants argue that under the arrangement had with plaintiff he was never actually employed, but was merely given the opportunity to appear in the foreclosure case with the sanction of the committee in an effort to supplant other counsel, and that if he were successful in his attempt he would be entitled to petition the court for the allowance of a fee for the services rendered in the foreclosure proceeding.

On the question of his discharge, plaintiff testified that upon receipt of his letter the defendants by concerted action proceeded pursuant to an appointment with him to officially notify him of his discharge, and it is argued that he was discharged, and under the terms of his letter to the committee of January 5, 1935, he therefore became entitled to be paid for the services he had theretofore rendered. Three of defendants witnesses denied the discharge and said that when plaintiff admitted that he could not supplant the other lawyers in the case he was told that there was no use of his continued efforts. The two questions of fact which counsel on both sides agree were the only

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issues submitted to the jury were thus presented to the jury by competent evidence, and it became a question of fact for the jury's determination as to whether plaintiff had been retained, also whether he was discharged, and therefore whether he was entitled to recover for the fees claimed.

The only ground urged for reversal is that the verdict is manifestly against the weight of the evidence and that it resulted from a misconception of the evidence and prejudice against him, and should therefore not be permitted to stand. There is no claim that the court erred in anywise in the conduct of the trial, and so far as we are able to ascertain the hearing was fairly conducted and the jury was fully and properly instructed as to the law applicable to the facts. Under these circumstances, the law applicable to the case is well settled; the verdict will not be disturbed upon appeal unless it is manifestly and palpably against the weight of the evidence. (Shearer v. Aurora E. & C. R. Co., 200 Ill. App. 225; Monahan v. Metropolitan Life Ins. Co., 207 Ill. App. 200.) And all questions of fact are deemed to have been settled by the verdict, if they are fairly presented, and the reviewing court will not interfere with the jury's finding thereon. (Shearer v. Aurora E. & C. R. Co., 200 Ill. App. 225.)

After a careful review of the record we have reached the conclusion that the verdict of the jury on the conflicting questions of fact presented is amply supported by the evidence and is not contrary to the manifest weight thereof, and no other error being assigned we think the court properly denied plaintiff's motion for a new trial and entered judgment upon the verdict. The judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

issues submitted to the jury were thus presented to the jury by competent evidence, and it became a question of fact for the jury's determination as to whether plaintiff had been retained, into whether he was discharged, and therefore whether he was entitled to recover for the fees claimed.

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After a careful review of the record we have reached the conclusion that the verdict of the jury on the conflicting questions of fact presented is amply supported by the evidence and is not contrary to the manifest weight thereof, and no other error being assigned we think the court properly denied plaintiff's motion for a new trial and entered judgment upon the verdict. The judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Gillham, J., concur.

40419

ANNA LaROCCO,
Appellee,

v.

JOSEPH ANTONELLO,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

300 I.A. 608[3]

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Joseph Antonello and Robert Walquist, to recover damages for personal injuries sustained by her when Antonello's automobile, driven by Walquist, in the course of Antonello's business, collided with another automobile in which plaintiff was a passenger. During the progress of the trial the suit was dismissed as to Walquist. The jury returned a verdict finding the remaining defendant Antonello guilty and assessing plaintiff's damages in the sum of $7,500. Antonello appeals from the judgment entered on the verdict.

Since defendant's liability is not questioned it will be unnecessary to state the facts pertaining to the accident. As ground for reversal it is urged that the jurors were improperly examined on voir dire, in that (1) the question of insurance carried by defendant, Antonello, was injected into the interrogation of jurors for the purpose of informing them that the burden of a judgment would fall upon an insurance company instead of defendant, and that the purpose of the inquiry was not made in good faith and was prejudicial to defendant; (2) that the court erred in refusing to allow defendant, Antonello, to withdraw a juror because of alleged improper remarks of plaintiff's counsel in the presence of the jury during the dismissal of codefendant, Walquist; (3) that the court erred in instructing the jury; and (4) that the verdict was excessive.

40412

ANNA LaROCCO,

Appellee,

v.

JOSEPH ANTONELLO,

Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

300 I.A. 608

MR. JUSTICE WILLIAM SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Joseph Antonello and Robert Malquist, to recover damages for personal injuries sustained by her when Antonello's automobile, driven by Malquist, in the course of Antonello's business, collided with another automobile in which plaintiff was a passenger. During the progress of the trial the suit was dismissed as to Malquist. The jury returned a verdict finding the remaining defendant Antonello guilty and assessing plaintiff's damages in the sum of $7,500. Antonello appeals from the judgment entered on the verdict.

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With reference to the first contention it appears that prior to the impaneling of the jury plaintiff filed a petition asking that she be allowed to examine the prospective jurors, touching their interest in the Union Automobile Indemnity Association. Her petition alleged that defendant, Antonello, at the time of the accident, carried liability insurance with this company, whose office is located at Bloomington, Illinois; that it represented him and had entered the appearance of its attorneys, Beverly & Klaskin, in the defense of the suit; that the insurance company is vitally interested in the cause, and is actually engaged in defending the same; that it has a large number of policyholders in Cook county, as well as other persons who are interested in the company, who may be called as prospective jurors; and that unless plaintiff be permitted to examine the jurors, touching their interest in the company, her interests will be unduly prejudiced.

The propriety of allowing the examination of prospective jurors in accordance with the prayer of the petition was discussed by court and counsel in the court's chambers, out of the presence of the jury, and it was finally suggested by the court that the first panel of four jurors be examined before the noon recess as to their other qualifications, and thus afford the court an opportunity to read the decisions tendered by counsel and decide the question of procedure at the beginning of the afternoon session. Accordingly, the first four jurors were examined and accepted by counsel for plaintiff, and at the beginning of the afternoon session, the court having decided to permit the interrogation, the first four jurors were asked by counsel for plaintiff the question: "Q. Are you interested financially, either as stockholders or otherwise, in the Union Automobile Indemnity Association?" Each juror answered in the negative. The next prospective juror was thereupon examined upon his voir dire, and asked a similar question, and he likewise answered in the negative. Defendant's

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counsel thereupon objected to asking the same question of each juror, and the court ruled that it would be better to propound one question after the examination of each panel of four. Substantially the same interrogatory was thereupon propounded to the second panel and their answers were in the negative. Before tendering the third panel to counsel for defendant, plaintiff's attorney repeated the interrogatory to the last panel of prospective jurors, and their answers were likewise in the negative. At this stage of the proceeding and out of the presence of the jury, defendant's counsel moved the court to withdraw a juror because of the repeated asking of this question, which was denied.

Defendant's counsel concede that under the authorities in this state prospective jurors may be interrogated on their voir dire as to any interest in an insurance company which may have insured the defendant on trial against liability for accidental injuries, where the inquiry is for the purpose of exercising the right of challenge, but they say that this privilege is discretionary with the court and should be exercised only where it clearly appears that plaintiff is proceeding in good faith and where a showing has been made that the inquiry is necessary for the preservation of plaintiff's rights; that in the case at bar there was nothing in the petition itself to justify the inquiry, inasmuch as no allegations are made to show that an investigation was conducted by plaintiff disclosing knowledge or information that would justify the bringing of the name of the insurance company to the attention of the jurors, or that plaintiff knew or had any reason to believe that the veniremen called might or could have been stockholders of the insurance company; and it is also urged that the repetition of the question four or five times unduly emphasized the interest of the insurance company in the case.

Courts of this state and of other jurisdictions have had frequent occasion to consider cases in which the interest of an

counsel thereupon objected to asking the same question of each juror, and the court ruled that it would be better to propound one question after the examination of each panel of four. Substantially the same interrogatory was thereupon propounded to the second panel and their answers were in the negative. Before tendering the third panel to counsel for defendant, plaintiff's attorney repeated the interrogatory to the last panel of prospective jurors, and their answers were likewise in the negative. At this stage of the proceeding and out of the presence of the jury, defendant's counsel moved the court to withdraw a juror because of the repeated asking of this question, which was denied.

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Courts of this state and of other jurisdictions have had frequent occasion to consider cases in which the interest of an

insurance company, not a party to the suit, has been disclosed to the jury. The procedure is always a delicate one and should be approached with caution, because the mere mention of an insurance company in the presence of the jury more than likely conveys to the jurors the fact that defendant carries indemnity insurance, which is likely to influence the jury's verdict, both as to the question of defendant's liability and the assessment of damages. On the other hand, it is to be rememberedthat plaintiff's right to an impartial, disinterested jury is equal to that of defendant and that plaintiff is entitled to such an examination of the jurors as will disclose whether they are free from prejudice to his interests, and there is no difference in a court of justice between the rights of litigants to a fair trial. It would obviously prejudice a plaintiff's case if a person carrying insurance in a company representing defendant were permitted to sit on the jury, and there is no way that a plaintiff can ascertain except by interrogation, whether a juror is interested in a defendant's insurance company, without an investigation, the expense of which would be so enormous in a county such as this as to make it prohibitive. Moreover, there is always the possibility that claim adjusters or investigators may become witnesses in the trial of a case, and plaintiff is entitled to know the possible interest of any juror in an insurance company or its employees. The courts of this state have therefore held that an inquiry such as this may be conducted, if made in good faith, and for the purpose of exercising the right of peremptory challenge. The leading case on this question and the last expression of the Supreme court is found in Smithers v. Henriquez, 368 Ill. 588. In that case prior to the calling of the jury and out of its presence, plaintiff made an application for leave to ask the jurors if they were interested financially, as stockholders or otherwise, in the American Employers' Insurance Company. Plaintiff had filed an affidavit in support of her application, which was allowed over

insurance company, not a party to the suit, has been disclosed to the jury. The procedure is always a delicate one and should be approached with caution, because the mere mention of an insurance company in the presence of the jury more than likely conveys to the jurors the fact that defendant carries indemnity insurance, which is likely to influence the jury's verdict, both as to the question of defendant's liability and the assessment of damages. On the other hand, it is to be remembered that plaintiff's right to an impartial, disinterested jury is equal to that of defendant and that plaintiff is entitled to such an examination of the jurors as will disclose whether they are free from prejudice to his interests, and there is no difference in a court of justice between the rights of litigants to a fair trial. It would obviously prejudice a plaintiff's case if a person carrying insurance in a company representing defendant were permitted to sit on the jury, and there is no way that a plaintiff can ascertain except by interrogation, whether a juror is interested in defendant's insurance company, without an investigation, the expense of which would be so enormous in a county such as this as to make it prohibitive. Moreover, there is always the possibility that claim adjusters or investigators may become witnesses in the trial of a case, and plaintiff is entitled to know the possible interest of any juror in an insurance company or its employees. The courts of this state have therefore held that an inquiry such as this may be conducted, if made in good faith, and for the purpose of exercising the right of peremptory challenge. The leading case on this question and the last expression of the Supreme court is found in Smithers v. Henrichsen, 308 Ill. 888. In that case prior to the calling of the jury and out of its presence, plaintiff made an application for leave to ask the jurors if they were interested financially, as stockholders or otherwise, in the American Employers' Insurance Company. Plaintiff had filed an affidavit in support of her application, which was allowed over

defendant's objection. The affidavit charged, and the defendant admitted, that the suit was being defended by that company and was represented by its counsel. It further stated the plaintiff believed that unless her counsel be allowed to question prospective jurors as to their financial interest in the insurance company, her rights might be seriously prejudiced. The affidavit was in all respects similar to the one filed by plaintiff in the case at bar. A single question proposed to be asked of the jurors was submitted, and the examination was ordered to be limited to that question, which was as follows: "Are you, Mr. Long, or any of you gentlemen, interested financially, either as stockholders or otherwise, in the American Employers' Insurance Company?" There was no response by any juror, and the inquiry was not pursued. It was there claimed that the purpose of the inquiry was a mere subterfuge and a clever guise to get before the jury the fact that the insurance company was defending the suit, and the court held that if that were true, the conduct of plaintiff's counsel could not be too strongly condemned. The court reached the conclusion, however, with two of the justices dissenting, that plaintiff, in disclosing to the court and opposing counsel in chambers, the purpose of his inquiry before any attempt was made to interrogate the jurors, and the attending circumstances indicated that the inquiry was made in good faith and for the purpose of exercising the right of challenge and was therefore proper.

In reaching this conclusion the court made an exhaustive review of the decisions in this state where they had on previous occasions justified the right to interrogate jurors as to their financial interest in an insurance company, and concluded that the inquiry should be made in good faith and so conducted as to eliminate if possible any resulting prejudice. The procedure followed in the case at bar was in all respects similar to the inquiry in Smithers v. Henriquez. While it is undoubtedly a

defendant's objection. The affidavit charged, and the defendant admitted, that the suit was being defended by that company and was represented by its counsel. It further stated the plaintiff believed that unless her counsel be allowed to question prospective jurors as to their financial interest in the insurance company, her rights might be seriously prejudiced. The affidavit was in all respects similar to the one filed by plaintiff in the case at bar. A single question proposed to be asked of the jurors was submitted, and the examination was ordered to be limited to that question, which was as follows: "Are you, Mr. Jones, or any of you gentlemen, interested financially, either as stockholders or otherwise, in the American Employers' Insurance Company?" There was no response by any juror, and the inquiry was not pursued. It was there claimed that the purpose of the inquiry was a mere subterfuge and a clever guise to get before the jury the fact that the insurance company was defending the suit, and the court held that if that were true, the conduct of plaintiff's counsel could not be too strongly condemned. The court reached the conclusion, however, with two of the justices dissenting, that plaintiff, in disclosing to the court and opposing counsel in chambers, the purpose of his inquiry before any attempt was made to interrogate the jurors, and the attending circumstances indicated that the inquiry was made in good faith and for the purpose of exercising the right of challenge and was therefore proper.

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better practice to ask the question collectively of the jurors, as was done in the latter case, we do not think the repetition of the question in the case at bar was necessarily prejudicial. The conclusion reached in Smithers v. Henriquez is controling in this proceeding, and the same reasons which prompted the court in that case to justify the inquiry of the prospective jurors are applicable to the procedure followed in this cause.

The second ground for reversal is that the court erred in refusing to allow Antonello to withdraw a juror and declare a mistrial on the ground of improper remarks of counsel for plaintiff in the presence of the jury during the dismissal of the codefendant Robert Walquist. It appears that during the trial plaintiff discovered, for the first time, that defendant's driver, Walquist, was a minor, and his counsel then moved to dismiss him from the case. Obviously, a valid judgment could not be entered against him without the appointment of a guardian ad litem where the court is aware of his minority. Defendant relies on sec. 52 of the Civil Practice Act (1937 Ill. Rev. Stats., chap. 110) which provides in effect that the plaintiff mayat any time before trial begins, upon notice to defendant, dismiss his action as to any defendant on the payment of costs, and that after the trial has begun he may on the same terms dismiss a defendant either upon the stipulation of the parties or on the order of court entered pursuant to the filing of a verified petition or affidavit setting forth the ground of such dismissal. The record discloses that although the motion to dismiss was made orally and in the presence of the jury, counsel for plaintiff did later file an affidavit at the direction of the court setting forth as ground for dismissal the fact that Walquist was a minor, eighteen years of age. Inasmuch as the jury would ultimately have been informed of the dismissal, we think defendant was not in anywise prejudiced by the procedure followed.

Criticism is made of two instructions given on behalf of

better practice to ask the question collectively of the jurors, as was done in the latter case, we do not think the repetition of the question in the case at bar was necessarily prejudicial. The conclusion reached in Whitney v. Henriques is controlling in this proceeding, and the same reasons which prompted the court in that case to justify the inquiry of the prospective jurors are applicable to the procedure followed in this cause.

The second ground for reversal is that the court erred in refusing to allow Antonello to withdraw a juror and declare a mistrial on the ground of improper remarks of counsel for plaintiff in the presence of the jury during the dismissal of the defendant Robert Malquist. It appears that during the trial plaintiff discovered, for the first time, that defendant's driver, Malquist, was a minor, and his counsel then moved to dismiss him from the case. Obviously, a valid judgment could not be entered against him without the appointment of a guardian ad litem where the court is aware of his minority. Safford v. Pollos on sec. 53 of the Civil Practice Act (1937 Ill. Rev. Stats., chap. 110) which provides in effect that the plaintiff may at any time before trial begins, upon notice to defendant, dismiss his action as to any defendant on the payment of costs, and that after the trial has begun he may on the same terms dismiss a defendant either upon the stipulation of the parties or on the order of court entered pursuant to the filing of a verified petition or affidavit setting forth the ground of such dismissal. The record discloses that although the motion to dismiss was made orally and in the presence of the jury, counsel for plaintiff did later file an affidavit at the direction of the court setting forth as ground for dismissal the fact that Malquist was a minor, eighteen years of age. Inasmuch as the jury would ultimately have been informed of the dismissal, we think defendant was not in anywise prejudiced by the procedure followed.

Criticism is made of two instructions given on behalf of

plaintiff. Instruction No. 10, dealing with the question of damages, included as an element of damage "her loss of time and inability to work, if any, on account of such injuries," and it is argued that since plaintiff was a housewife she was not entitled to be compensated for loss of time. The complaint alleges that plaintiff "has been and is unable to manage her affairs by reason of her said injuries," and the jury having before it the circumstances indicating the nature of her station in life and occupation, were qualified to determine whether she should be compensated for any loss of time.

With reference to instruction No. 7 it is argued that the jury was not confined to evidence offered as to damages, but were permitted to indulge in the belief that their own estimate as to damages was controlling. This instruction charged the jury that they were to estimate the damages "from the facts and circumstances in proof, relating to the subject of the extent of plaintiff's damages," and this we think was a proper charge; it limited the jury to a consideration of the facts and circumstances in proof or in evidence and was not misleading. Moreover, the court discussed the instruction with counsel for both parties and when it was being considered the court suggested to defendant's attorney that if he had any objection to this particular instruction it would not be given, but defendant's attorney advised the court to "go ahead and give it." Under the circumstances defendant is not in a position to complain thereof.

The remaining ground relates to the assessment of damages. The facts disclose that plaintiff was sixty-six years of age. Her medical bills and expense up to the time of the trial were $811, and her physician testified that she would need future medical attention. As a result of the accident she suffered from a skull fracture, accompanied by a concussion and eleven fractures of the ribs. Two of the ribs were broken in two places and the other six

plaintiff. Instruction No. 10, dealing with the question of damages, included as an element of damage "her loss of time and inability to work, if any, on account of such injuries," and it is argued that since plaintiff was a housewife she was not entitled to be compensated for loss of time. The complaint alleges that plaintiff "has been and is unable to manage her affairs by reason of her said injuries," and the jury having before it the circumstances indicating the nature of her station in life and occupation, were qualified to determine whether she should be compensated for any loss of time.

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were not only fractured but broken to such an extent that they overlapped and will so remain permanently. Plaintiff was unable to perform her usual household duties incidental to the taking care of her home and four people, and there is evidence that her vision was permanently affected. She undoubtedly suffered much pain and discomfort, and as a result of her injuries her usefulness is greatly impaired. Upon this state of facts we do not think the verdict of $7,500 excessive.

Referring again to the inquiry of the prospective jurors as to their interest in the Union Automobile Indemnity Company as applicable to the amount of the verdict, the court in Aetitus v. Spring Valley Coal Company, 246 Ill. 32, cited in the Smithers case, said that if it appears that the jury was not actuated by passion or prejudice on that account a verdict will not be disturbed, and in the Smithers case the court said if the case were close on the facts it would not hesitate to reverse the judgment because of an improper examination of the jurors. In this proceeding defendant's liability is not at all questioned. From a careful examination of the record we have reached the conclusion that the verdict was not produced by passion or prejudice on account of the injection of defendant's insurance company into the case, and that no reversible error was otherwise committed in the trial of the case. The judgment of the Circuit court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

were not only frightened but evidence is such as seems that they overlapped and will do recover permanently. Plain it was terrible to perform her usual household duties incident to the training care of her home and four people, and there is evidence that her vision was permanently affected. She undoubtedly suffered much pain and discomfort, and as a result of her injuries her nervousness is greatly impaired. Upon this state of facts we do not think the verdict of $7,500 excessive.

Referring again to the inquiry of the prospective jurors as to their interest in the Union Automobile Indemnity Company as applicable to the amount of the verdict, the court in Collins v. Spring Valley Coal Company, 246 Ill. 32, cited in the Smithern case, said that if it appears that the jury was not actuated by passion or prejudice on that account a verdict will not be disturbed, and in the Smithern case the court said if the case was close on the facts it would not hesitate to reverse the judgment because of an improper examination of the jurors. In this proceeding defendant's liability is not at all questioned. From a careful examination of the record we have reached the conclusion that the verdict was not produced by passion or prejudice on account of the injection of defendant's insurance company into the case, and that no reversible error was otherwise committed in the trial of the case. The judgment of the circuit court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Mccullen, J., J., and Philleyer, J., concur.

40428

ALEX POLATSEK,
Appellee,

v.

DR. MANDEL COHEN,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

15A

300 I.A. 608

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Alex Polatsek, plaintiff, brought suit against Dr. Mandel Cohen, defendant, for damages resulting from an alleged assault and battery by defendant. The jury returned a verdict in favor of plaintiff for $2,500, and in response to an interrogatory propounded to the jury, as to whether the action of defendant was wilful and wanton, the jury answered in the affirmative. On the hearing of defendant's motion for a new trial the judgment was reduced by remittitur to $1,500. Plaintiff filed a consent to the remittitur, and the court entered judgment for $1,500, from which defendant appeals.

The statements of plaintiff and defendant as to the occurrence are so utterly at variance as to be hopelessly irreconcilable. Defendant is a physician who has maintained an office and living quarters at 47th street and Lake Park avenue, Chicago, for more than 17 years. Sunday evening, June 28, 1936, plaintiff entered defendant's office and living quarters at about 8:30 p.m., and according to plaintiff's allegations, defendant "without cause given him therefor by the plaintiff," shot and discharged a pistol, wounding plaintiff in the left thigh and in the calf of the right leg, severely injuring him.

Defendant presents an entirely different version. He testi-

40428

ALEX POLATSEK,
Appellee,

v.

DR. MANDEL COHEN,
Appellant.

APPEAL FROM MUNICIPAL COURT,
COOK COUNTY.

300 I.A. 608

MR. JUSTICE MCGOORAN DELIVERED THE OPINION OF THE COURT.

Alex Polatsek, plaintiff, brought suit against Dr. Mandel Cohen, defendant, for damages resulting from an alleged assault and battery by defendant. The jury returned a verdict in favor of plaintiff for $3,500, and in response to an interrogatory propounded to the jury, as to whether the action of defendant was willful and wanton, the jury answered in the affirmative. On the hearing of defendant's motion for a new trial the judgment was reduced by remittitur to $1,500. Plaintiff filed a consent to the remittitur, and the court entered judgment for $1,500, from which defendant appeals.

The statements of plaintiff and defendant as to the occurrence are so utterly at variance as to be hopelessly irreconcilable. Defendant is a physician who has maintained an office and living quarters at 17th street and Lake Park avenue, Chicago, for more than 17 years. Sunday evening, June 28, 1936, plaintiff entered defendant's office and living quarters at about 8:30 p.m., and according to plaintiff's allegations, defendant "without cause given him therefor by the plaintiff," shot and discharged a pistol, wounding plaintiff in the left thigh and in the calf of the right leg, severely injuring him.

Defendant presents an entirely different version. He testi-

fied that plaintiff, who was sitting in the waiting room, jumped on him when he came into the hallway and frightened him; that the witness called the police immediately; that he saw two other men with plaintiff, one of whom was pointing a gun at him; and believing he was in danger and in fear of his life, defendant discharged his pistol downward once to frighten the men away, then called the police, told them he had shot a man, was given permission to attend a patient seriously ill, and thereafter went to the police station and explained the occurrence to Lieutenant Berounsky. Fred J. Lyons, a disinterested witness, testifying for defendant, said that he saw two men coming out of the hallway leading to defendant's office and run east toward the Illinois Central Railroad viaduct, the man in front having his hand at his back pocket as he ran. Martin Turbow, another witness, corroborated defendant's testimony, saying that he saw plaintiff and two other men drive up to defendant's mother's house in an automobile shortly before the occurrence, and that plaintiff then went to the doctor's office and afterward drove away with the two men. Berounsky, police lieutenant, also corroborated the doctor by saying that the doctor called up the police station and later came in himself, and Berounsky testified that when he saw plaintiff after the shooting he seemed to be under the influence of liquor.

As ground for reversal it is urged that defendant did not have a fair trial by reason of the improper examination of witnesses and remarks of court and counsel, and that the verdict of the jury was the result of passion and prejudice and against the manifest weight of the evidence. We refrain from commenting in detail on the evidence adduced upon the hearing as the cause will have to be retried. From a careful examination of the record we are convinced that defendant did not receive a fair trial, and that the verdict and affirmative answer of the jury to the interrogatory whether defendant's conduct was wilful and wanton, might well have been produced by the manner

fied that plaintiff, who was sitting in the waiting room, jumped on him when he came into the hallway and fired second shot; that the witness called the police immediately; that he saw two other men with plaintiff, one of whom had pointing a gun at him and believing he was in danger and in fear of his life, defendant discharged his pistol downward once to frighten the man away, then called the police, told them he had shot a man, was given permission to attend a patient seriously ill, and thereafter went to the police station and explained the occurrence to Lieutenant Baronsky. Fred L. Lyons, a disinterested witness, testifying for defendant, said that he saw two men coming out of the hallway leading to defendant's office and run west toward the Illinois Central Railroad viaduct, the man in front having his hand at his back pocket as he ran. Martin Turbon, another witness, corroborated defendant's testimony, saying that he saw plaintiff and two other men drive up to defendant's mother's house in an automobile shortly before the occurrence, and that plaintiff then went to the doctor's office and afterward drove away with the two men. Baronsky, police lieutenant, also corroborated the doctor by saying that the doctor called up the police station and later came in himself, and Baronsky testified that when he saw plaintiff after the shooting he seemed to be under the influence of liquor.

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in which the case was tried. The following excerpts from the testimony illustrate some of the incidents that occurred on the hearing: It was defendant's contention that plaintiff was under the influence of liquor, and together with two other men attempted an attack upon defendant which provoked the shooting. Lieutenant Berounsky testified that he smelled liquor on plaintiff's breath after the occurrence. The court struck out this portion of Berounsky's testimony, saying "it was an assumption on the part of the witness," that "he was not an expert," and that "he cannot qualify as an expert smeller."

When defendant's counsel asked about plaintiff's reputation in the neighborhood, the court said: "That hasn't a thing on earth to do with this. The president of the United States could shoot somebody, and he has a fairly good reputation." Defendant had several well known men in the neighborhood as character witnesses, including Spencer W. Castle, editor of the Hyde Park Herald, a local newspaper; Judge Daniel P. Trude of the Circuit court; John F. Keeley, an assistant to the judge of the Probate court; and Lieutenant Joseph Berounsky of the Hyde Park station. All these men were neighbors, living in the general locality where defendant had resided and practiced medicine for a great many years, and it was highly prejudicial for the court to discredit the effect of testimony of this character.

When Dr. Cohen was on the stand the following questions and answers were made: "The Doctor: I smelled whiskey on the man. The Court: You couldn't be a better expert than the lieutenant. Strike it. The Witness: I know the smell of liquor on the breath, etc. The Court: Can you tell what age it is when you smell it? The Witness: No, your Honor, I can't. Q. Not that good? A. No." Afterward, when James J. Collins, a police officer at the Hyde Park station testified: "I think the man [plaintiff] had been drinking a little bit," plaintiff's counsel objected and asked that the

in which the case was tried. The following excerpts from the testimony illustrate some of the incidents that occurred on the hearing: It was defendant's contention that plaintiff was under the influence of liquor, and together with two other men attempted an attack upon defendant which provoked the shooting. Lieutenant Boroumsky testified that he smelled liquor on plaintiff's breath after the occurrence. The court struck out this portion of Boroumsky's testimony, saying "it was an assumption on the part of the witness," that "he was not an expert," and that "he cannot qualify as an expert smeller."

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answer be stricken, but the court permitted the answer to stand, saying: "He seems to have stated it as a fact." If the testimony of one police officer on the question of plaintiff's sobriety was competent, it is difficult to perceive why that of others should not have been submitted to the jury for what it was worth, without any comment by the court.

In testifying to the extent of his injuries plaintiff said: "I was not able to when I went to work, but it was necessary to go to work or starve, since I did not have any money in my possession." He also testified that after leaving the Chicago Hospital he went to the police station and inquired about the status of the case against defendant, and that while there some one said to him: "You are a mighty small man to do anything with Dr. Mandel Cohen, because Dr. Mandel Cohen is an influential doctor and you are a poor fish;" that "that was what they said to me, and I went home." Plaintiff's attorney carried this type of examination still further by asking Berounsky the question: "In this case, then, after you knew the defendant shot a man, you still let him go until he had made his calls?" Dr. Cohen testified that he had a patient desperately ill and when he first reported the matter to the police he asked whether it would be agreeable for him to call first on the patient and report at the police station thereafter, and Berounsky had evidently given him permission so to do. The effect of this type of examination was undoubtedly prejudicial and must have conveyed to the jury the fact that the police officers were extending favors to and regarded defendant as an influential man in the community as against plaintiff, who, according to his testimony, was characterized as a "poor fish" by the officers at the station.

When John F. Keeley was called as a character witness on behalf of defendant, plaintiff's counsel and the court propounded the following interrogatories upon cross-examination: "Q. You call

answer be stricken, but the court permitted the answer to stand, saying: "He seems to have stated it as a fact." If the testimony of one police officer on the question of plaintiff's sobriety was competent, it is difficult to perceive why that of others should not have been submitted to the jury for what it was worth, without any comment by the court.

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When John F. Keeley was called as a character witness on behalf of defendant, plaintiff's counsel and the court propounded the following interrogatories upon cross-examination: "Q. You call

yourself an assistant judge of the Probate Court? Don't you? A. No, I don't. I said assistant to the Probate Judge. My title is not deputy clerk of the Probate Court. Q. Is there such a thing as an assistant to the Judge of the Probate? A. That is correct. Q. You are a lawyer, aren't you? A. I am, sir. Q. Can you show me in the Statutes? Mr. Hoover [attorney for defendant]: I object to that. Mr. Haft: Let's look in the Statutes. A man says he is a Judge. The Witness: I didn't say that. The Court: Do you hold an elective or appointive office? A. Appointive. Q. Judges are elected, aren't they? A. Judges are elected. I make no pretense of being a judge."

As hereinbefore stated the evidence of plaintiff's and defendant's witnesses was utterly irreconcilable, and in that situation it was extremely important that the case be fairly tried without any improper remarks by either court or counsel or the examination of witnesses in such a manner as to create prejudice against either party. Some of the evidence hereinbefore set forth might easily have produced the verdict and the affirmative response to the interrogatory as to whether or not defendant's action was wilful and wanton, and we have therefore reached the conclusion that justice will be better served if the judgment is reversed and the cause remanded for a new trial.

Defendant complains of several instructions relating to the burden of proof, the weight of the evidence, damages, and the question of wilful and wanton misconduct, but no specific objections are made as to these various instructions, and plaintiff's counsel say defendant did not object to them when they were tendered. All the instructions complained of relate to fundamental principles of law and upon a retrial the parties should have no difficulty in presenting to the court approved instructions on the various phases of the cause.

For the reasons given the judgment of the Superior court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

yourself an assistant judge of the probate court? Don't you? A. No, I don't. I said assistant to the probate judge. My title is not deputy clerk of the probate court. Q. Is there such a thing as an assistant to the judge of the probate? A. That is correct. Q. You are a lawyer, aren't you? A. I am, sir. Q. Can you show me in the statutes? Mr. Hoover [attorney for defendant]: I object to that. Mr. Hart: Let's look in the statutes. A man says he is a judge. The witness: I didn't say that. The court: Do you hold an elective or appointive office? A. Appointive. Q. Judges are elected, aren't they? A. Judges are elected. I make no pretense of being a judge."

As hereinbefore stated the evidence of plaintiff's and defendant's witnesses was utterly irreconcilable, and in that situation it was extremely important that the case be fairly tried without any improper remarks by either court or counsel or the examination of witnesses in such a manner as to create prejudice against either party. Some of the evidence hereinbefore set forth might easily have produced the verdict and the affirmative response to the interrogatory as to whether or not defendant's action was willful and wanton, and we have therefore reached the conclusion that justice will be better served if the judgment is reversed and the cause remanded for a new trial.

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For the reasons given the judgment of the superior court is reversed and the cause remanded for a new trial.

40551

ALONZO A. POPE, administrator de bonis non of the estate of AARON EATON, deceased,
Appellee,

v.

UNITED FUNERAL SYSTEM ASSOCIATION, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

300 I.A. 608

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Alonzo A. Pope, administrator de bonis non of the estate of of Aaron Eaton, deceased, brought suit in the Municipal court to recover $250 upon a burial insurance policy issued to deceased. Trial was had by the court without a jury, resulting in a finding and judgment for plaintiff. Defendant appeals.

Defendant, United Funeral System Association, is a burial insurance society, organized and doing business under the burial insurance laws of Illinois. July 24, 1933, it issued its policy of insurance in the sum of $250 to Aaron Eaton, plaintiff's intestate, designating Nettie Eaton, wife of the insured, as beneficiary. The beneficiary predeceased the insured, having died in December, 1936, and after her death deceased did not designate a new beneficiary. Eaton died December 29, 1936, and letters of administration de bonis non were issued July 27, 1937. This suit was instituted approximately sixteen months after the death of the insured.

The principal defenses interposed are that the provisions of the policy with reference to notice of death and the furnishing of proof of death, as provided by the bylaws, were not complied with. The circumstances relating to these issues, as disclosed by the abstract of record, indicate that the day following Eaton's death, his brother, Willard Eaton, together with one of plaintiff's counsel,

40551

ALONZO A. TOPE, administrator de bonis non of the estate of AARON EATON, deceased, appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
UNITED NATIONAL SYSTEM ASSOCIATION, a corporation, appellant.	

3001.A.608

MR. JUSTICE PRICHARD DELIVERED THE OPINION OF THE COURT.

Alonzo A. Tope, administrator de bonis non of the estate of of Aaron Eaton, deceased, brought suit in the Municipal court to recover $250 upon a burial insurance policy issued to deceased. Trial was had by the court without a jury, resulting in a finding and judgment for plaintiff. Defendant appeals.

Defendant, United National System Association, is a burial insurance society, organized and doing business under the burial insurance laws of Illinois. July 24, 1923, it issued its policy of insurance in the sum of $250 to Aaron Eaton, plaintiff's intestate, designating Hettie Eaton, wife of the insured, as beneficiary. The beneficiary predeceased the insured, having died in December, 1926, and after her death deceased did not designate a new beneficiary. Eaton died December 29, 1926, and letters of administration de bonis non were issued July 27, 1927. This suit was instituted approximately sixteen months after the death of the insured.

The principal defenses interposed are that the provisions of the policy with reference to notice of death and the furnishing of proof of death, as provided by the bylaws, were not complied with. The circumstances relating to these issues, as disclosed by the abstract of record, indicate that the day following Eaton's death, his brother, Hilford Eaton, together with one of plaintiff's counsel,

went to the office of the insurance company to make claim for the proceeds of the burial policy. Willard Eaton testified that a Miss Gibson, in defendant's office, declined payment because the deceased "was sick at the time the last revival was made," but did not say anything about the filing of proofs of death, nor did she give Willard Eaton or his attorney any blanks for the filing of proofs required by the by-laws. He also said that Miss Gibson made no point about notice of death. After Eaton's death Willard also went to see the president of the defendant corporation and requested him to take charge of his brother's body. He was referred to Mr. Kersey, who was connected with the undertaking company, whose president was the same person as the president of defendant and had its office in the same building. When Eaton asked Kersey what steps would be necessary in order to get the body buried, Kersey told him "the only thing you have to do is to give Mr. McGowan an order for the body."

Sydney P. Brown, one of the attorneys for plaintiff, who was examined by the court, corroborated Eaton's statements. He testified that when they went to the office of the insurance company nothing was said about proofs of death or blanks of any kind, and no blanks were tendered them. The burial company did demand the receipt book and the policy, and stated that the deceased was not in good health when the policy was reinstated, but no other objection was made to the payment of the claim.

It appears from the evidence that the receipt book and policy were in possession of the deceased's brother-in-law, who also claimed the body. The delay in bringing suit is partly accounted for by a controversy in the Probate court, where a citation against the brother-in-law of deceased was necessary ultimately to procure this receipt book and the policy.

By way of defense defendant relies principally upon the following provision of the policy: "Upon the death of a member immediate

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Sydney T. Brown, one of the attorneys for plaintiff, who was examined by the court, corroborated Aston's statements. He testified that when they went to the office of the insurance company nothing was said about proofs of death or blanks of any kind, and no blanks were tendered them. The burial company did demand the receipt book and the policy, and stated that the deceased was not in good health when the policy was reinstated, but no other objection was made to the payment of the claim.

It appears from the evidence that the receipt book and policy were in possession of the deceased's brother-in-law, who also claimed the body. The delay in bringing suit is partly accounted for by a controversy in the Probate court, where a citation against the brother-in-law of deceased was necessary ultimately to procure this receipt book and the policy.

By way of defense defendant relies principally upon the following provision of the policy: "Upon the death of a member immediate

notice shall be served upon the Association upon blanks which shall be furnished by the Association, and such notices will be sent to the office of the secretary at the Association's principal place of business or any of its recognized branches." The obvious purpose of this provision is to aid the undertaking firm, which was headed by the president of the defendant corporation, to secure the insured's body for burial. The insured died December 29, 1936, and on the following day oral notice of the intestate's death was given defendant's president, who informed Willard Eaton and his attorney that "the only thing you have to do is to give Mr. McGowan an order for the body." Pursuant to this direction, deceased's brother signed the blank given him which was dated December 30, 1936, addressed to the County Hopsital and read: "Kindly release remains of Aaron Eaton to Kersey, McGowan & Morsell, 3515 Indiana Avenue. Respectfully, Willard A. Eaton, Brother, 6418 Vernon. Normal 6156." We think this oral notice to the defendant and the circumstances attending it were sufficient compliance with the provisions of the policy on the question of notice. In Traders Mutual Life Insurance Co. v. Johnson, 200 Ill. 359, 364, the court, under similar circumstances, said: "The company will be bound by acts of the president and secretary performed in its office, whether such acts are in writing or verbal, whether they make a contract, waive a forfeiture or give a consent." Moreover, the directions on the policy provide that "in the event of death of the insured the claimant should notify the Home Office at 3515 Indiana Avenue, Telephone Douglas 8285-8286, Chicago, Illinois, at once." It was evidently intended that for the guidance of the beneficiary a telephone call would be sufficient notice. It would logically follow that the oral notice given to the president by deceased's brother and his counsel, would likewise be sufficient.

The other ground urged for reversal is that the provisions of the bylaws with respect to filing proofs of death were not complied with, in that suit was instituted more than one year after proofs of

notice shall be served upon the association upon blanks which shall be furnished by the association, and such notices will be sent to the office of the secretary at the association's principal place of business or any of its recognized branches." The obvious purpose of this provision is to aid the undertaking firm, which was headed by the president of the defendant corporation, to secure the insured's body for burial. The insured died December 29, 1936, and on the following day oral notice of the intestate's death was given defendant's president, who informed Willard Eaton and his attorney that "the only thing you have to do is to give Mr. McGowan an order for the body." Pursuant to this direction, deceased's brother signed the blank given him which was dated December 30, 1936, addressed to the County Hospital and read: "Kindly release remains of Aaron Eaton to Kersey, McGowan & Morrell, 3215 Indiana Avenue. Respectfully, Willard E. Eaton, Brother, 6413 Vernon. Normal 6156." We think this oral notice to the defendant and the circumstances attending it were sufficient compliance with the provisions of the policy on the question of notice. In Trabeke Mutual Life Insurance Co. v. Johnson, 200 Ill. 389, 394, the court, under similar circumstances, said: "The company will be bound by acts of the president and secretary performed in its office, whether such acts are in writing or verbal, whether they make a contract, waive a forfeiture or give a consent." Moreover, the directions on the policy provide that "in the event of death of the insured the claimant should notify the Home Office at 3215 Indiana Avenue, Telephone Douglas 8288-8289, Chicago, Illinois, at once." It was evidently intended that for the guidance of the beneficiary a telephone call would be sufficient notice. It would logically follow that the oral notice given to the president by deceased's brother and his counsel, would likewise be sufficient.

The other ground urged for reversal is that the provisions of the bylaws with respect to filing proofs of death were not complied with, in that suit was instituted more than one year after proofs of

death were furnished. The policy contains the following provision: "Art. 18, Sec. 2. TIME TO SUE--No suit shall be maintained upon this Certificate at law or in equity unless said suit be instituted within one year after proofs of death shall have been furnished the Association." No specific time is designated for furnishing proofs of death. The proofs herein were ultimately supplied January 28, 1938, and suit was instituted April 22, 1938. The delay is unaccounted for in the record, but we find no provision in the bylaws which requires the administrator to furnish proofs within any specified time, and undoubtedly the lapse of more than a year before proofs of death were furnished may be explained in part by the controversy that arose in the Probate court, and also because of defendant's contention that deceased's ill health at the time the policy was reinstated constituted a defense to the suit. This is borne out by the fact that as late as July 5, 1938, defendant filed a petition for a subpoena duces tecum, setting forth that "in order for it to establish its defense in the above cause of action it will be necessary that the part of the records of the Pullman Porters' Benefit Association, having to do with the membership record of Aaron Eaton, the deceased member, whose benefit certificate in defendant association is the basis of this suit, be subpoenaed for use in evidence; that the said record from January 1, 1935, to the date of his death, will tend to disclose that shortly prior to the reinstatement said member was being treated by the company doctor, and at the time of said reinstatement representation was made that the said deceased member was in good health, free from any disease, all of which defense would be shown by the said record of said Pullman Porters' Benefit Association upon the production of records in response to the said subpoena duces tecum." It was not until July 13, 1938, and after the subpoena duces tecum had issued, that defendant actually raised the defense of no notice and lack of proofs of death.

After an examination of the record, we are satisfied that

death were furnished. The policy contains the following provision:

"Art. 18, Sec. 2. TIME TO SUE--No suit shall be maintained upon this certificate at law or in equity unless said suit be instituted within one year after proofs of death shall have been furnished the association." No specific time is designated for furnishing proofs of death. The proofs herein were eliminately supplied January 28, 1932, and suit was instituted April 22, 1932. The delay is unaccounted for in the record, but we find no provision in the bylaws which requires the administrator to furnish proofs within any specified time, and undoubtedly the lapse of more than a year before proofs of death were furnished may be explained in part by the controversy that arose in the probate court, and also because of defendant's contention that deceased's ill health at the time the policy was reinstated constituted a defense to the suit. This is borne out by the fact that as late as July 2, 1932, defendant filed a petition for a subpoena duces tecum, setting forth that in order for it to establish its defense in the above cause of action it will be necessary that the part of the records of the William Tortens' Benefit Association, having to do with the membership record of Aaron Sutton, the deceased member, whose benefit certificate in defendant association is the basis of this suit, be subpoenaed for use in evidence; that the said record from January 1, 1930, to the date of his death, will tend to disclose that shortly prior to the reinstatement said member was being treated by the company doctor, and at the time of said reinstatement representation was made that the said deceased member was in good health, free from any disease, all of which defense would be shown by the said record of said William Tortens' Benefit Association upon the production of records in response to the said subpoena duces tecum." It was not until July 13, 1932, and after the subpoena duces tecum had issued, that defendant actually raised the defense of no notice and lack of proofs of death.

After an examination of the record, we are satisfied that

neither of the defenses interposed is meritorious. This was a policy of indemnity which should be construed in keeping with the agreement of the parties. (Forest City Ins. Co. v. Hardesty, 182 Ill. 39.) The defendant had no valid or meritorious defense and therefore the court properly entered judgment for plaintiff. The judgment of the Municipal court is accordingly affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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policy of indemnity which should be construed in keeping with the
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JUDGMENT AFFIRMED.

enman, J. J., and Sullivan, J., concur.

40486

SIDNEY BELMONT, doing business as SIDNEY BELMONT AMUSEMENT SERVICE,
Appellee,

vs.

HAL SILVER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

300 I.A. 609

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that defendant had breached a contract between the parties which provided that in such a case defendant should pay plaintiff $350 as liquidated damages. Defendant filed an answer. Plaintiff moved for judgment on the pleadings, which was allowed by the court and judgment for $350 was entered against defendant, from which he appeals. The question presented is whether the provision in the contract for liquidated damages should be construed as a penalty.

Plaintiff is a booking agent for actors and had a contract to book and direct a circus at St. Louis, Mo. Defendant is a tight wire performer. January 15, 1938, the parties made a written contract which provided, among other things: "In consideration of $350 paid to The Artist, less $____ Net as fees for managing and booking." The artist, the defendant, agreed to present his act for 14 days, commencing April 25, 1938, at the St. Louis circus. The agreement contained a number of rules and regulations concerning the conduct of defendant and provided that should defendant refuse or fail to play this engagement he would pay to plaintiff "as liquidated damages" $350, the amount equal to defendant's salary.

Plaintiff's statement of claim alleged that the contract provided that defendant was not permitted to play any engagement for any person, corporation or partnership during the life of this contract, and that contrary to this provision, defendant was playing

SIDNEY BELMONT, John, claiming as
SIDNEY BELMONT AMUSEMENT SERVICE,
Appellee,

vs.

HAL SLAVIN,
Appellant.

Appeal from Allegheny County
of Minister.

MR. PRESIDING JUSTICE McGOVERN
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that defendant had breached a contract between the parties which provided that in such a case defendant should pay plaintiff $350 as liquidated damages. Defendant filed an answer. Plaintiff moved for judgment on the pleadings, which was allowed by the court and judgment for $350 was entered against defendant, from which he appeals. The question presented is whether the provision in the contract for liquidated damages should be construed as a penalty.

Plaintiff is a booking agent for actors and had a contract to book and direct a circus at St. Louis, Mo. Defendant is a tight wire performer. January 15, 1938, the parties made a written contract which provided, among other things: "In consideration of $350 paid to the artist, less $ ___ Act as fees for booking and booking." The artist, the defendant, agreed to present his act for 14 days, commencing April 22, 1938, at the St. Louis circus. The agreement contained a number of rules and regulations concerning the conduct of defendant and provided that should defendant refuse or fail to play this engagement he could pay to plaintiff "as liquidated damages" $350, the amount equal to defendant's salary.

Plaintiff's statement of claim alleged that the contract provided that defendant was not permitted to play any engagement for any person, corporation or partnership during the life of this contract, and that contrary to this provision, defendant was playing

an engagement for an amusement concern in Chicago for the period of time covered by the contract and has failed to appear and fulfill his engagement in accordance with the terms of the contract.

Defendant by his answer admitted the execution of the contract but alleged that he was excused from performing as he had not been paid the consideration mentioned in the contract or any part thereof, and that the St. Louis circus was conducted in violation of the rules of the American Federation of Actors, of which defendant was a member, and if under those circumstances defendant performed with the St. Louis circus he would be subject to fines and expulsion from the Federation.

The answer further asserted that the most plaintiff could receive in the event defendant gave his act was $35, and therefore the provision for the payment of $350 as liquidated damages is a penalty. In Advance Amusement Co. v. Franke, 268 Ill. 579, the court said:

"As was said by this court in Gobble v. Linder, 76 Ill. 157, no branch of the law is involved in more obscurity by contradictory decisions than whether a sum named in an agreement to secure performance will be treated as liquidated damages or a penalty, and as each case must depend upon its own peculiar and attendant circumstances, general rules of law on this question are often of little practical utility. While the intention of the parties on this question must be taken into consideration, the language of the contract is not conclusive. The courts of this State, as well as in other jurisdictions, lean towards a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained."

That a stipulated sum will not be allowed as liquidated damages unless it may be fairly allowed as compensation for the breach, and that courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it will be treated as a penalty and no more than actual damages can be recovered; and that in general, a sum of money in gross, to be paid for the non-performance of an agreement is considered as a

an engagement for an amusement concert in Chicago for the series of time covered by the contract and the failure to appear and fulfill his engagement in accordance with the terms of the contract.

Referring to this, Sutherland, the opinion of the District Court allowed that he was excused from performing at the not been paid the consideration mentioned in the contract by any part thereof, and that the defendant's conduct was contrary to violation of the rights of the American Institution of Actors, of which defendant was a member, and if under these circumstances defendant performed when the act, Actor should be subject to fines and expulsion from the Institution.

The court further asserted that the most elementary equity receive in the event defendant gave his to the pay, and therefore the provision for the payment of $50 as liquidated damages is a penalty. In Silvow Amusement Co. v. Kinney, 93 Ill. 172, the court said:

"As was said by this court in Wolfe v. Lumber, 75 Ill. 157, no branch of the law is involved in more obscurity by contradictory decisions than whether a sum named in a contract to secure performance will be treated as liquidated damages or a penalty, and as each case must depend upon its own peculiar and attendant circumstances, general rules of law on this question are often of little practical utility. While the intention of the parties on this question must be taken into consideration, the language of the contract is not controlling. The courts of this State, as well as in other jurisdictions, lean towards a construction of contracts as fixing liquidated damages and prevent the parties to recover only damages actually sustained."

That a stipulated sum will not be allowed as liquidated damages unless it may be fairly allowed as compensation for the breach, and that courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it will be treated as a penalty and no more than actual damages can be recovered; and that in general, a sum of money in gross, to be paid for the non-performance of an agreement is considered as

penalty. This rule has been universally followed, the most recent case being Pellegrini v. Bredenbeck, No. 40330, opinion filed in this court April 10, 1939.

Applying this rule to the instant facts, we have no difficulty in arriving at the conclusion that the amount in question is to be considered as a penalty and not as liquidated damages. Here the defendant denied he had received any consideration for entering into the contract in question, and on motion for judgment on the pleadings this statement must be taken as true. Watt v. Cecil, 368 Ill. 510. It would be unconscionable to require defendant to pay his manager an amount equal to the whole salary defendant was to receive for the entire performances, and this would be especially true where defendant had not received any part of his salary.

In his statement of claim plaintiff did not seek to recover for actual damages sustained but sought only to recover the full amount mentioned in the contract as liquidated damages. We are of the opinion that, construing the contract in the light of all the circumstances, plaintiff cannot recover this amount as liquidated damages, and the judgment against defendant is reversed.

REVERSED.

Matchett and O'Connor, JJ., concur.

penalty. This view has been universally believed, the most recent case being Williams v. Hodges, 1c. 4050, opinion filed in this court April 10, 1905.

Applying this rule to the instant facts, we have no difficulty in arriving at the conclusion that the amount in question is to be considered as a penalty and not as liquidated damages. Here the defendant leased the and received any consideration for entering into the contract in question, and on motion for judgment on the pleadings this statement must be taken as true. Tatt v. Cecil, 308 Ill. 310. It would be unconscionable to require defendant to pay his manager an amount equal to the whole salary defendant was to receive for the entire performance, and this would be especially true where defendant had not received any part of his salary.

In this statement of claim plaintiff did not seek to recover for actual damages sustained but sought only to recover the full amount mentioned in the contract as liquidated damages. We are of the opinion that, considering the contract in the light of all the circumstances, plaintiff cannot recover this amount as liquidated damages, and the judgment against defendant is reversed.

REVERSED.

Hatchett and O'Connor, JJ., concur.

40496

ADELINE GRIMM, Executrix of the Estate of GUST H. GRIMM, Deceased, Appellee,

vs.

WILLIAM DUNN, Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

300 I.A. 609

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $750 entered upon the verdict of a jury in an action seeking to recover damages caused by an automobile accident.

Gust H. Grimm originally filed his complaint seeking damages for injuries suffered by him because of defendant's alleged negligent operation of his automobile; about a year thereafter and while the suit was pending Grimm died from causes not related to the automobile accident; his widow, Adeline Grimm, filed her petition as executrix of the estate of Gust H. Grimm, asserting that she was continuing the suit as executrix of the estate and that the only damages sought were for the injuries to Grimm, his necessary expenses and property damage to his automobile, with loss of earnings and pain and suffering.

Defendant in this court apparently makes the point that because plaintiff failed to allege that Grimm came to his death from other causes than the accident, there was no cause of action stated. The argument is not clear, but it is sufficient to say that the action was brought for personal injuries, as appears from the amended complaint. Moreover, at the conclusion of plaintiff's case defendant moved for a directed verdict, but the alleged insufficiency of the pleadings was not then raised. This was also true when defendant repeated his motion at the conclusion of defendant's case.

When defendant filed a motion for a new trial, the objection

ADELINE GULAK, Executrix of the
Estate of Jack H. Gulak, Deceased,
Appellee,

vs.

WILLIAM DUSA,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

300 I.A. 609

MR. PRESIDING JUSTICE SCHNEIDER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $750 entered upon the verdict of a jury in an action seeking to recover damages caused by an automobile accident.

Mrs. Gulak originally filed her complaint seeking damages for injuries suffered by her because of defendant's alleged negligent operation of his automobile; about a year thereafter and while the suit was pending Mrs. Gulak died from causes not related to the automobile accident; her widow, Adeline Gulak, filed her petition as executrix of the estate of Mrs. G. Gulak, asserting that she was continuing the suit as executrix of the estate and that the only damages sought were for the injuries to Mrs. G. Gulak, the necessary expenses and property damage to his automobile, with loss of earnings and pain and suffering.

Defendant in this court apparently bases the point that because plaintiff failed to allege the cause of Mrs. G. Gulak's death from other causes than the accident, there is no cause of action stated. The argument is not clear, but it is sufficient to say that the action was brought for personal injuries, as separate from the wrongful death action. Moreover, at the conclusion of plaintiff's case defendant moved for a directed verdict, but the alleged insufficiency of the pleadings was not then raised. This was also true when defendant requested the action of the conclusion of defendant's case.

When defendant filed a motion for a new trial, the objection

that the complaint failed to aver that Gust Grimm did not die as the result of the accident was for the first time made. The court on plaintiff's motion permitted her to file an amended complaint to conform to the proof, in accordance with sec. 46 of the Civil Practice Act. The testimony having showed that Gust H. Grimm died from other causes than the injuries received in the accident, the amended complaint was duly filed and defendant's motion for a new trial was denied. In Wetherell v. Chicago City R. Co., 104 Ill. App. 357, 361, it was held that under such circumstances the only necessary change in the declaration is the substitution of the representative of the deceased party as plaintiff. And in Prouty v. City of Chicago, 250 Ill., 222, it was held that when one suffers an injury as a consequence of the negligent act of another, he has a right of action, which existed at common law, for the resulting damages. If he dies from some other cause than the injury the action for the injury survives to his personal representative. Here the cause of action is not based on the death of Grimm. Moreover, under the Practice Act, section 42, all defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived.

Defendant argues that Grimm was guilty of contributory negligence. The accident happened on Mannheim Road in Chicago, opposite the entrance to St. John's cemetery, which lies east of the Road; both cars were headed southward; with Mr. Grimm in the Ford car driven by him were his son and two other young men; it was about 7:30 o'clock in the morning; no one was with defendant in his car, which was slightly ahead of Grimm's car. Elmer Grimm, the son, testified that as they started to pass defendant's car it swung to the east toward the cemetery entrance; the cars collided at the cemetery gate; the horn of Grimm's car was blown while he was 100 feet back of defendant's car; Grimm received injuries to his wrist and arm.

that the council had failed to aver that Grimm did not die as the result of the accident was for the first time made. The court on plaintiff's motion permitted her to file an amended complaint to conform to the proof, in accordance with sec. 40 of the Civil Practice Act. The testimony having proved that Mr. Grimm died from other causes than the injuries received in the accident, the amended complaint was duly filed and defendant's motion for a new trial was denied. In Ketterell v. Chicago City R. Co., 104 Ill. App. 387, 391, it was held that under such circumstances the only necessary change in the declaration is the substitution of the representative of the deceased party as plaintiff. And in Crosby v. City of Chicago, 250 Ill., 222, it was held that upon one suffering an injury as a consequence of the negligent act of another, he has a right of action, which existed at common law, for the recovering damages. If he dies from some other cause than the injury the action for the injury survives to his personal representative. Here the cause of action is not based on the death of Grimm. Moreover, under the Practice Act, section 42, all defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived.

Defendant argues that Grimm was guilty of contributory negligence. The accident happened on Sunnybrook Road in Cicero, opposite the entrance to St. John's cemetery, which lies east of the Road; both cars were headed southward; with Mr. Grimm in the Ford car driven by him were his son and two other young men; it was about 7:30 o'clock in the morning; he was with defendant in his car, which was directly ahead of Grimm's car. Almost direct, the car, defendant that as they started to pass defendant's car it swung to the east toward the cemetery entrance; the cars collided at the cemetery gate; the horn of Grimm's car was blown while he was 100 feet back of defendant's car; Grimm received injuries to his wrist and arm.

The other two occupants of Grimm's car gave substantially the same testimony.

The question of contributory negligence on the part of Grimm was properly left to the jury, and it cannot be said that the verdict is manifestly against the weight of the evidence. On the other hand there was evidence that as Grimm's car was almost up to defendant's car defendant, without warning, swung his car directly in the path of the other. The issues of negligence of defendant and contributory negligence of Grimm were properly submitted to the jury and we see no reason to disagree with the verdict.

The brief for defendant has not followed Rule 7 of this court, thereby adding to the difficulty of understanding the points made.

The verdict was justified by the evidence, and as no reversible errors occurred upon the trial the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

The other two occupants of plaintiff's car have substantially the same testimony.

The question of contributory negligence on the part of plaintiff was properly left to the jury, and is cannot be said that the verdict is manifestly against the weight of the evidence. On the other hand there was evidence that as plaintiff's car came up to defendant's car in-bound, without warning, swung its car directly in the path of the plaintiff. The issues of negligence of defendant and contributory negligence of plaintiff were properly submitted to the jury and we see no reason to disagree with the verdict.

The trial judge has not followed this 7 of this court, merely adding to the difficulty of understanding the points made.

The verdict was justified by the evidence, and as no reversible error occurred upon the trial the judgment is affirmed.

AFFIRMED.

Maxwell and O'Connor, JJ., concur.

40504

RALPH C. SULLIVAN, Executor of the Estate of Mary O'Neil, Deceased, Appellant,

vs.

ARTHUR CULP, JAMES SHISHEM, HAROLD EISENBERG and LYLISS EISENBERG, Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

300 I.A. 609

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit on bonds given in a forcible detainer action brought against Arthur Culp, one of the instant defendants; judgment was against Culp in that suit, which was affirmed in this court. (260 Ill. App. 443.) Upon trial by the court of this suit on the bonds judgment was against plaintiff, who appeals.

The forcible detainer action was to recover possession of the first floor apartment and garage at 4417 West Monroe street, Chicago. In our opinion in the forcible detainer case we recited somewhat in detail the facts, which will not be repeated here. On the appeal in that case two bonds were given, one signed by defendant James Shishem, and when plaintiff objected to this as insufficient an additional bond was given signed by defendants Harold Eisenberg and Lyliss Eisenberg.

Culp went into possession of the premises under an agreement to buy them; subsequently the owner advised Culp that a clear title to the premises could not be given, as one of the mortgagees holding a mortgage on the premises had instituted foreclosure proceedings; both the plaintiff in the forcible detainer proceedings and Culp, the defendant, were made defendants in the foreclosure proceedings, and it was decreed that out of the proceeds of the sale Culp should be paid $2600, $1000 of which was the amount he paid on the contract of sale, and $1600, the amount he had expended on repairs on the

HALPH C. SULLIVAN, Receiver of the)
Estate of Mary Ulrich, Deceased,)
Appellant,)
)
vs.)
)
ARTHUR GULP, JAMES WILSON, HAROLD)
RICHMOND and [illegible],)
Appellees.)

DELIVERED THE OPINION OF THE COURT.

This is a suit for funds given in a forcible detainer action brought against Arthur Gulp, one of the insane defendants; judgment was against Gulp in that suit, which was affirmed in this court. (260 Ill. App. 442.) Upon trial by the court of this suit on the merits judgment was against plaintiff, who appeals.

The forcible detainer action was to recover possession of the first floor apartment and garage at 4417 West Monroe street, Chicago. In our opinion in the forcible detainer case we recited somewhat in detail the facts, which will not be repeated here. In the appeal in that case two funds were given, one signed by defendant James Wilson, and when plaintiff objected to this as insufficient an additional fund was given signed by defendants Harold Richmond and Lydia Richmond.

Gulp went into possession of the premises under an agreement to buy them; subsequently the owner advised Gulp that a clear title to the premises could not be given, as one of the mortgagees holding a mortgage on the premises had instituted foreclosure proceedings; both the plaintiff in the forcible detainer proceedings and Gulp, the defendant, were made defendants in the foreclosure proceedings, and it was decreed that one of the proceeds of the sale Gulp should be paid $2600, $1000 of which was the amount he paid on the contract of sale, and $1600, the amount he had expended on repairs on the

premises.

The main defense presented in this cause and which was sustained by the court, was that the parties had settled all the matters in issue between them. Three witnesses testified on behalf of the defendant to this settlement. They testified that after the opinion was rendered in this court in the forcible detainer suit, Shishem, Culp, Mrs. Culp and David S. Horwich, attorney for Arthur Culp, went to the office of Arthur W. Kettles, plaintiff's attorney, and after computing the liability of Culp to plaintiff, paid Kettles $500 in full settlement and received a receipt therefor. The credibility of the testimony concerning this transaction is strongly attacked by counsel for plaintiff.

David S. Horwich, an attorney practicing at this Bar, testified that he had represented Culp in the forcible detainer proceedings in the Municipal court and also in this court; that subsequent to the opinion of this court he had numerous telephone conversations with Arthur W. Kettles, attorney for plaintiff; that in the summer of 1931 Shishem, Culp, Mrs. Culp, and the witness Horwich went to the office of Kettles and discussed the exact amount for which Culp would be liable by reason of the confirmation by the Appellate court of the judgment in the forcible detainer suit. The witness gave in substance the conversation with Kettles - that it was agreed that Culp should pay $500 in full settlement of all obligations; that this was done and Kettles gave a receipt for this to Culp; Horwich told Kettles he was leaving town and asked Kettles to prepare a satisfaction piece of the judgment and file it, and Kettles promised to do this. Shishem testified substantially to the same effect; that Culp paid the money to Kettles and received a receipt; that "everybody shook hands and we went out."

Mrs. Culp testified that she was present at this meeting and that Kettles said it would take about $500 to clear up everything;

premises.

The main defense presented in this cause and which was sustained by the court, was that the parties had settled all the matters in issue between them. Three witnesses testified on behalf of the defendant to this settlement. They testified that after the opinion was rendered in this court in the juvenile defendant suit, Shiness, Culp, Mrs. Culp and David S. Morrison, attorney for Arthur Culp, went to the office of Arthur V. Kettles, plaintiff's attorney, and after computing the liability of Culp to plaintiff, paid Kettles $500 in full settlement and received a receipt therefor. The credibility of the testimony concerning this transaction is strongly attacked by counsel for plaintiff.

David S. Morrison, an attorney practicing at bar, testified that he had represented Culp in the juvenile defendant proceedings in the municipal court and also in this court; that subsequent to the opinion of this court he had numerous telephone conversations with Arthur V. Kettles, attorney for plaintiff; that in the summer of 1931 Shiness, Culp, Mrs. Culp, and the witness Morrison went to the office of Kettles and it was agreed that the sum for which Culp would be liable by reason of the confirmation by the Appellate court of the judgment in the juvenile defendant suit. The witness gave in substance the conversation with Kettles - that it was agreed that Culp should pay $500 in full settlement of all obligations; that the money was done and Kettles gave a receipt for this to Culp; Arthur (sic) Kettles he was leaving town and asked Kettles to drop the matter in-tion place of the judgment and take it, and Kettles promised to do this. Shiness testified substantially to the same effect; that Culp paid the money to Kettles and received a receipt; that "everybody shook hands and we went out."

Mrs. Culp testified that she was present at the meeting and that Kettles said it would take about $500 to clear up everything;

that Culp paid Kettles this amount, receiving a receipt which Kettles said would release any obligation on the bonds. Mrs. Culp also testified that she had not been living with her husband for three years and did not know where he was.

Kettles, a brother-in-law of plaintiff Sullivan, denies that any such transaction took place, saying there was never any discussion with reference to settlement of the case. Kettles stated on direct examination that he had been disbarred in January, 1937. In In re Kettles, 365 Ill. 168, the order of disbarment may be found. The ground for this was the appropriation to his own use of money belonging to a client.

Although according to Horwich and the others the money was paid by Culp to Kettles in the summer of 1931, plaintiff made no demand upon defendants for settlement of their obligations on the bonds and did not bring suit thereon until more than seven years had elapsed after the cause of action accrued and about six and a half years after the money was paid to Kettles as claimed. This delay in making any demand upon defendants raises a strong presumption that the money was paid as narrated by defendants.

Counsel for plaintiff contend that the testimony of the settlement is unbelievable, as plaintiff never would have accepted $500 in settlement of a claim of over $4000. This includes the rental of the second floor of the premises in question, but the forcible detainer action was for possession of the first floor and garage only, and the appeal bonds were conditioned upon the payment of rent due or that may become due by reason of the withholding of "the premises in controversy." They did not authorize the assessment of damages for withholding any other premises.

Plaintiff's counsel argue that Kettles was without authority to accept less than the amount due plaintiff in satisfaction of plaintiff's claim; that the condition of the bond was that, if

that Gulp paid Kettles this amount, receiving a receipt which Kettles said would release any obligation on the bonds. Mrs. Gulp also testified that she had not been living with her husband for three years and did not know where he was.

Kettles, a brother-in-law of plaintiff testified, denies that any such transaction took place, saying, there was never any discussion with reference to settlement of the case. Kettles stated on direct examination that he had been discharged in January, 1927. In In re Kettles, 6b fit. 1.63, the order of disbarment may be found. The ground for this was the appropriation to his own use of money belonging to a client.

Although according to Morrison and the others the money was paid by Gulp to Kettles in the summer of 1921, plaintiff made no demand upon defendants for settlement of their obligations on the bonds and did not bring suit thereon until more than seven years had elapsed after the cause of action accrued and about six and a half years after the money was paid to Kettles as claimed. This delay in making any demand upon defendants raises a strong presumption that the money was paid as narrated by defendants.

Counsel for plaintiff contend that the testimony of the settlement is unbelievable, as plaintiff never would have accepted $500 in settlement of a claim of over $4000. This includes the rental of the second floor of the premises in question, but the forcible detainer action was for possession of the first floor and garage only, and the appeal bonds were conditioned upon the payment of rent due or that may become due by reason of the withholding of "the premises in controversy." They did not authorize the assessment of damages for withholding any other premises.

Plaintiff's counsel argue that Kettles was without authority to accept less than the amount due plaintiff in satisfaction of plaintiff's claim; that the condition of the bond was that, if

defendant should fail in his appeal in the forcible detainer suit, the principal and sureties would "pay all rent due or that may become due before the final determination of this suit"; that all the rent due under this provision at the time of the alleged settlement was $2480, and that Kettles had no authority to accept less than this amount as a compromise.

Horwich testified that at this meeting in the office of Kettles, "we discussed with him the exact amount for which Culp would be liable by reason of the confirmation of the Appellate court of the judgment by confession entered by the Municipal court"; that, "Mr. Kettles said to me, 'Horwich, how much had you figured we have got coming?' I said, 'According to my conception of the law we would be liable to you for rent from April, 1930, until the date that Mrs. Culp received the master's deed, which I think was in December of 1930'"; that the rent was figured on the basis of approximately $60 a month for 8 months, which made $480. In addition there were court costs, which ran the figure up to $500. Horwich further testified that in making this payment, "I did not consider that I was paying him more or less than he was justly entitled to. I did not consider that we were paying him anything in excess. I felt that my client, having lost the case in the Appellate court, should have paid rent for those 8 months at $60 a month from the time the suit was started until the time that she received the master's deed. That was 8 months at $60, $10 court costs and $3 court costs. I agreed to give him the exact amount he wanted."

This was not a case of compromise or payment of a less sum than the respective attorneys believed was due. Indeed, in this court counsel for defendants argue that there is only a total liability of $395 and that the payment to Kettles was excessive.

defendant should fail in his appeal if the terrible testimony stands, the principal and auditor would "pay all rent due or that may become due before the final determination of this suit"; that all the rent due under this provision at the time of the alleged settlement was $240, and that Kettles had no authority to accept less than this amount in a compromise.

Orvice testified that at this meeting in the office of Kettles, "we discussed with him the exact amount for which only would be liable by reason of the confirmation of the appellate court of the judgment by concession entered by the Municipal court"; that, "Mr. Kettles said to me, 'Mr. Orvice, how much had you figured we have got coming?' I said, 'According to my conception of the law we would be liable to you for rent from April, 1930, until the date that Mrs. Only received the master's deed, which I think was in December of 1932'"; that the rent was figured on the basis of approximately $60 a month, for 8 months, which made $480. In addition there were court costs, which ran the figure up to $500. Orvice further testified that in making this payment, "I did not consider that I was paying him more or less than he was justly entitled to. I did not consider that we were paying him anything in excess. I felt that my client, having lost the case in the Appellate court, should have paid rent for those 8 months at $60 a month from the time the suit was started until the time that she received the master's deed. That was 8 months at $60, $10 court costs and $3 court costs. I agreed to give him the exact amount he wanted."

This was not a case of compromise or payment of a less sum than the respective attorneys believed was due. Indeed, in this court counsel for defendants argue that there is only a total liability of $525 and that the payment to Kettles was excessive.

However this may be, the testimony of Horwich is definite to the effect that there was no understanding between him and Kettles that less than the amount due was paid. Usually an attorney is empowered to receive his client's money. Ruckman v. Alwood, 44 Ill. 183; Custer v. Agnew, 83 Ill., 194; Allinson v. Pierson, 285 Ill. 387.

The trial court in weighing the evidence commented upon the fact that the only witness denying the settlement testified to by Horwich and others was Kettles, the disbarred attorney, who had represented plaintiff in all the litigation concerning the property. He also commented upon the long period of time which elapsed before any demand was made upon defendants.

It has been settled by very many decisions that the finding of the trial judge, who tries a case without a jury and hears and observes the witnesses, should not be disturbed unless his conclusion is manifestly against the weight of the evidence. City of Quincy v. Kemper, 304 Ill. 303, 307, and many other cases.

Applying this rule, we are of the opinion that we would not be justified in concluding that the trial Judge should not have accepted the testimony presented by defendants showing a settlement.

As we see no convincing reason to disturb the judgment, it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

However this may be, the testimony of Orvick is definite to the effect that there was no understanding between him and Settles that less than the amount was ever paid. Usually an attorney is empowered to receive his client's money. Anderson v. Atwood, 44 Ill. 158; Ginger v. Agnew, 63 Ill., 194; Allison v. Jerman, 250 Ill. 387.

The trial court in weighing the evidence considered much the fact that the only witness bearing the settlement testified to by Morelon and Orvick was Settles, the disbarred attorney, who had represented plaintiff in all the litigation concerning the property. He also commended upon the long period of time which elapsed before any demand was made upon defendants.

If this been settled by very many decisions that the finding of the trial judge, who has a very vigorous a duty and have all observes the witnesses, should not be disturbed unless manifestation is manifestly against the weight of the evidence. Gilmore v. Gaines, 3 Ill. App. 366, 367, and many other cases.

Applying this rule, we are of the opinion that we would not be justified in contending that the trial judge should not have accepted the testimony presented by defendants supporting a settlement.

As we see no controlling reason to disturb the judgment, it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

40520

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PATRICK J. BILLINGS,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

300 I.A. 609

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant, with Rose Marie Gennarelli, was charged with conspiracy to cheat and defraud certain parties and to embezzle and convert to their own use certain interest coupons and divers checks. Rose Marie Gennarelli was allowed a separate trial and testified on behalf of the State in the instant case; a jury found defendant Billings guilty and fixed his punishment at imprisonment in the penitentiary and a fine of $1000; he has sued out this writ of error, seeking a reversal of the judgment.

Miss Gennarelli testified that she was 28 years of age and had been in the employ of the Securities Service Corporation; her duties were to handle bonds of the Book-Cadillac Hotel properties, which was under reorganization; that she met Billings at a ballroom in April, 1936, and thereafter saw him about three nights a week; that thereafter Billings received from her cash and numerous checks and money orders which she had stolen from her employers at defendant Billings' request.

Defendant first makes the point that the State failed to prove defendant guilty of a conspiracy; that Miss Gennarelli testified that she did not do the things charged in the indictment by agreement with defendant, but under coercion or threat by him. It is admitted that she stole and embezzled the funds in question and that the defendant received and converted them to his own use.

Miss Gennarelli testified that the defendant asked her to cash some coupons belonging to her employer and give the proceeds

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PATRICK J. KILLI CO,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. JUSTICE DUNNE DELIVERED THE OPINION OF THE COURT:

Defendant, with Rose Marie Gunnarelli, was charged with conspiracy to cheat and defraud certain parties and to wrongfully and convert to their own use certain intoxicating liquors and divers checks. Rose Marie Gunnarelli was allowed a separate trial and testified on behalf of the State in the instant case; a jury found defendant Billings guilty and fixed his punishment at imprisonment in the penitentiary and a fine of $1000; he has sued out this writ of error, seeking a reversal of the judgment.

Miss Gunnarelli testified that she was 22 years of age and had been in the employ of the Pacifica Service Corporation; her duties were to handle funds of the Loan-Credition Hotel Properties, which was under reorganization; that she met Billings at a ballroom in April, 1930, and thereafter saw him about three nights a week; that thereafter Billings received from her checks and negotiable checks and money orders which she had stolen from her employers at defendant Billings' request.

Defendant first makes the point that the State failed to prove defendant guilty of a conspiracy; that Miss Gunnarelli testified that she did not do the things charged in the indictment by agreement with defendant, but under coercion or threat by him. It is admitted that she stole and converted the funds in question and that the defendant received and converted them to his own use.

Miss Gunnarelli testified that the defendant made her to cash some coupons belonging to her employer and give the proceeds

to him, promising to pay it back; that the following day she extracted some interest coupons belonging to her employer, sent them to the bank by a messenger boy, who cashed them and turned over the proceeds, $100, to her; that the same evening she gave this to defendant, and he inquired, "Did anybody notice anything?" that she replied, "No"; that he said "It was easy, wasn't it?" Two days later she again saw defendant, who told her to get some more money from the office; on her replying that she did not want to do that any more defendant said he had a lot of money and could pay it back, and "Whatever you are doing is for both of us, and you will never be sorry as I will take the blame if anything comes up down at the office"; that thereafter she continued her peculations almost every week, giving the money to defendant; that when defendant went to Hollywood, California, she purchased with the cash proceeds of stolen coupons American Express money orders payable to defendant, which he received and used; that she was afterward employed by S. W. Strauss & Co., where Mr. M. C. Kuehn was manager of the bond department and she was under his supervision; that she used to lay a bunch of checks on his desk for signature, and he would sign and return them to her; that through this means she obtained some seven checks signed by Mr. Kuehn, each payable to defendant in amounts ranging from $220 to $420; that she mailed these checks to the defendant. Miss Gennarelli testified this was done "not as a result of any agreement"; that she gave defendant this money because she was afraid of him.

Defendant testified that Miss Gennarelli told him that she had been in an accident and had received a large sum of money. She denied making any such statement. Defendant repeatedly testified that he did not make any demands on Miss Gennarelli and did not threaten to expose her and did not in anywise threaten her; that he did not know the money she gave him was stolen.

to him, promising to pay it back; that the following day she extracted some interest coupons belonging to her employer, sent them to the bank by a messenger boy, who cashed them and turned over the proceeds, $100, to her; that the same evening she gave this to defendant, and he inquired, "Did anybody notice anything?" that she replied, "No"; that he said "It was easy, wasn't it?" Two days later she again saw defendant, who told her to get more money from the office; on her replying that she did not want to do that, he said he had a lot of money and could pay it back, and "Whatever you are going in for both of us, and you will never be sorry as I will take the blame if anything comes up down at the office"; that thereafter she continued her peculation about every week, giving the money to defendant; that when defendant went to Hollywood, California, she purchased with the cash proceeds of stolen coupons Western Union money orders payable to defendant, which he received and used; that she was afterward employed by S. W. Strauss & Co., where Mr. G. Lamm was manager of the bond department and she was under his supervision; that she used to lay a lunch of tickets on his desk for signature, and he would sign and return them to her; that during this same she obtained some seven checks of that by Mr. Lamm, each payable to defendant in amounts ranging from $200 to $400; that she mailed these checks to the defendant. Her testimony certified this was done "not as a result of any agreement"; that she gave defendant this money because she "trusted" him.

Defendant testified that Joe Donnerzell told him that she had been in an accident and had received a large sum of money. She denied making any such statement. Defendant repeatedly testified that he did not ask her to make no more donnerzell and did not threaten to expose her and did not in anywise intimidate her; that he did not know the money she gave him was stolen.

Defendant cites cases defining conspiracy as a combination of two or more persons to accomplish by some concerted action some criminal or unlawful purpose, Tribune Co. v. Thompson, 342 Ill. 503, and also cites cases where there was no proof of any concerted action or agreement therefor, but merely a passive cognizance of the wrongful act. It is argued that the embezzlements were not the result of any agreement between defendant and Miss Gennarelli, but that she was forced to do the wrongful acts because of threats made by him. The evidence does not support this defense. She was very much in love with defendant and did as he requested because of this unfortunate infatuation. She expected to be married to him, and this was a moving factor in her actions.

People enter into agreements through a variety of motives. One party to an agreement may be moved thereto by one motive and the other party by an entirely different motive, but the agreement to do a wrong thing through joint action comes within the legal definition of a conspiracy to do an unlawful act. The evidence here supported the charge of conspiracy.

It is next said that the trial court erred in sustaining objections to the testimony of Mrs. Gene Charters concerning a certain telephonic conversation between defendant and Miss Gennarelli. Mrs. Charters testified that she was an experienced court reporter of the Criminal court of Cook county; that she was employed to report a telephonic conversation; that she dialed the telephone number of Miss Gennarelli, a woman's voice responded, and she then transcribed a conversation which took place over the telephone between defendant, who was sitting in an adjoining room, and the woman at the other end of the telephone line; she was asked if she could identify this woman's voice and, although repeatedly questioned about this, said she could not identify it as the voice of Miss Gennarelli; thereupon, upon motion the trial court sustained objections to her reading from her shorthand notes this conversa-

Defendant cites cases defining conspiracy as a combination of two or more persons to accomplish by some concerted action some criminal or unlawful purpose. Pritchett v. Commonwealth, 3ad 111, 503, and also other cases where there was no proof of any concerted action or agreement therefor, but merely a passive acquiescence of the wrongful act. It is argued that the enterprises were not the result of any agreement between defendant and Miss Gannerelli, but that she was forced to do the wrongful acts because of threats made by him. The evidence does not support this defense. She was very much in love with defendant and did as he requested because of this affirmative inducement. She expected to be married to him, and this was a moving factor in her actions.

People enter into agreements through a variety of motives. One party to an agreement may be moved thereto by one motive and the other party by an entirely different motive, but the agreement to do a wrong thing through joint action comes fit in the legal definition of a conspiracy to do an unlawful act. The evidence here supported the charge of conspiracy.

It is next said that the trial court erred in sustaining objections to the testimony of Mrs. Dunfrere concerning a certain telephonic conversation between defendant and Miss Gannerelli. Mrs. Dunfrere testified that she was an experienced court reporter of the Criminal Court of Cook County; that she was employed to report a telephonic conversation; that she dialed the telephone number of Miss Gannerelli, a woman's voice responded, she then transcribed a conversation which took place over the telephone between defendant, who was sitting in an adjoining room, and the woman at the other end of the telephone line; she was asked if she could identify this woman's voice and, although repeatedly questioned about this, said she could not identify it as the voice of Miss Gannerelli; therefore, upon motion the trial court sustained objections to her reading from her shorthand notes this conversa-

tion, and the record indicates that defendant's counsel abandoned the attempt to impeach MissGennarelli by the testimony of Mrs. Charters. No offer was made as to what the witness would testify. Subsequently, however, the court did permit the testimony of defendant concerning this alleged conversation. Miss Gennarelli denied having any conversation with defendant at the time stated by Mrs. Charters and told in some detail of her presence elsewhere than at her home at the time mentioned by Mrs. Charters.

Severe criticism is made by defendant's counsel of the conduct of the trial Judge. We regret to say that the trial court rather encouraged frivolity on the part of the attorneys both for the State and for the defendant. The court referred more than once to the well known vantriloquist's dummy, "Charlie McCarthy," probably to the amusement of the jurors and others in the court room; but these remarks were at the expense of the attorney for the State, and could not have been prejudicial to defendant. Also, there were useless and undignified remarks made by the assistant State's attorney and, to a certain extent, by counsel for defendant. It would be useless to extend this opinion by narrating all the objectionable statements and comments made by the court and the respective counsel in the case.

It is seemingly recognized as proper practice for a defense counsel to impart an air of lightness or frivolity to the trial of a criminal charge; to cause a case to be "laughed out of court" is generally recognized as favorable to a defendant. While we deplore the manner in which the present case was tried, we cannot say that it was so prejudicial to the defendant as to justify a reversal.

Police officer Dobert was asked whether he knew the reputation of the defendant for truth and veracity, to which he replied, "Bad." He was then asked, "Would you believe him under oath?" and his answer was, "I wouldn't." The point is made that there was no

tion, and the record indicates that defendant's counsel accepted the offer to impeach itself by the testimony of Mrs. Chartere. No offer was made as to what the witness would testify. Subsequently, however, the court did permit the testimony of defendant concerning this alleged conversation. Mrs Chartere denied having any conversation with defendant at the time stated by Mrs. Chartere, and told in some detail of her presence elsewhere then at her home at the time mentioned by Mrs. Chartere.

Severe criticism is made by defendant's counsel of the conduct of the trial judge. The record is not that the trial court rather encouraged frivolity on the part of the attorneys both for the State and for the defendant. The court referred more than once to the well known vaudeville's dancy, "Charlie Chartey," probably on the occasion of the jurors and others in the court room; but these remarks were at the expense of the attorney for the State, and could not have been prejudicial to defendant. Also, there were useless and unjustified remarks made by the assistant State's attorney and, to a certain extent, by counsel for defendant. It would be useless to extract this opinion by narrating a few objectionable examples of the comments made by the court and the respective counsel in the case.

It is essentially recognized as proper practice for a defense counsel to impeach to all of lightness or frivolity to the trial of a criminal charge; to cause a case to be "laughed out of court" is generally recognized as favorable to a defendant. While we believe the manner in which the prosecuting case was tried, we cannot say that it was so prejudicial to the defendant as to justify a reversal.

Police officer Cobbett was asked whether he knew the reputation of the defendant for truth and veracity, to which he replied, "Bad." He was then asked, "Would you believe him under oath?" and his answer was, "I wouldn't." The point is made that there was no

showing that this reputation was based on a general reputation of the defendant in the neighborhood where he resided or did business, nor of any particular time, citing The People v. Willy, 301 Ill. 307, and The People v. Lehner, 326 Ill. 216. These cases hold, in substance, that an opinion as to the reputation of a defendant must not rest on isolated instances but upon the general reputation. The question was objectionable, but the answer supplied the necessary facts. Officer Dobert testified that he had known defendant for about eight years; that he knew his reputation from police officers and also from certain citizens whose names he gave. The criticism of his testimony properly goes more to the weight to be given it than to its competency. The People v. Hicks, 362 Ill. 238.

Defendant contends that the court's instructions to the jury were confusing and not applicable to the facts. The objections for the most part are technical and not of sufficient importance to require a reversal. They for the most part state the general rule as to the crime of conspiracy. We see no reversible error with reference to these instructions.

We hold that, while we deprecate the manner in which the case was tried, yet, in view of the convincing character of the evidence presented as to the guilt of defendant, the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

showing that this reputation was based on a general reputation of the defendant in the neighborhood where he resided or did business, nor of any particular case, citing The People v. Fitz, 325 Ill. 307, and The People v. Brown, 325 Ill. 416. These cases hold, in substance, that an opinion as to the reputation of a defendant must not rest on isolated instances but upon the general reputation. The question was objectionable, and the proper foundation necessary facts. Witness Ostert testifies that he had known defendant for about eight years; that he knew his reputation from police officers and also from certain citizens whom he gave. The criticism of his testimony properly goes back to the weight to be given it that is its competency. The People v. White, 325 Ill. 434.

Defendant contends that the court's instructions to the jury were misleading and not applicable to the facts. The objections for the most part are technical and of a nature to require a reversal. Such is not the case. The general rule as to the crime of conspiracy. We see no reversible error with reference to these instructions.

We hold that, while we disapprove the manner in which the case was tried, yet, in view of the controlling character of the evidence presented as to the guilt of defendant, the judgment is affirmed.

Affirmed.

Matchett and O'Connor, JJ., concur.

40500

UNITED STATES GYPSUM COMPANY,
a Corporation,

vs.

THOMAS D. RANDALL, CHICAGO SANITARIUM,
a Corporation, et al.

ECONOMY PLUMBING & HEATING COMPANY,
Inc., a Corporation, and JOE KOMINSKY
and CHARLES ROSS, doing business as
Economy Plumbing & Heating Company,
Appellants,

vs.

JOHANNA HABENICHT,
Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

300 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Economy Plumbing & Heating Company, Inc., a corporation, and Joe Kominsky and Charles Ross, doing business as Economy Plumbing & Heating Company, seek to reverse that part of a decree entered by the Circuit court of Cook county denying their claim of $19,160 for a mechanic's lien and dismissing their intervening petitions for want of equity.

August 1, 1929, Dr. Alexander Magnus was president, principal stockholder and the active head of the Chicago Sanitarium, Inc., which operated a private hospital for mental patients at 29th street and Prairie avenue, Chicago. The hospital was located on lots 47, 48 and 49; the adjoining lots, 50, 51 and 52, were unimproved and then owned by Dr. Magnus; he conveyed the lots to the Sanitarium. Mrs. Johanna Habenicht, who is defending that portion of the decree appealed from, was a stockholder and a director in the sanitarium and the mother-in-law of Dr. Magnus.

August 1, 1929, Magnus and the Sanitarium entered into a contract with Thomas D. Randall and Harold Vagtborg, doing business as Randall and Vagtborg, for the construction of a new hospital building

40500

UNITED STATES EXPRESS COMPANY,
a Corporation,

vs.

THOMAS D. RANDALL, COLONEL M. VALTHOR,
a Corporation, et al.

COOK COUNTY PLANNING & BUILDING COMPANY,
Inc., a Corporation, and THE FIRST NATIONAL
and UNASSIGNED BANK, doing business as
Economy Planning & Heating Company,
Appellees,

vs.

JOHANNA HAMMIGHT,
Appellee.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Economy Planning & Heating Company, Inc., a corporation, and the secretary and service boss, doing business as Economy Planning & Heating Company, seek to reverse that part of a decree entered by the circuit court of Cook county denying their claim of $8,150 for a mechanic's lien and dismissing their intervening petitions for want of equity.

August 1, 1929, Dr. Lindsayer Hughes was president, principal stockholder and the active head of the Chicago Institutes, Ltd., which operated a private hospital for mental patients at 3234 street and Prairie avenue, Chicago. The hospital was located on lots 47, 48 and 49; the adjoining lots, 50, 51 and 52, were unimproved and then owned by Dr. Hughes; he purchased the lots to the institutes. Mrs. Johanna Hammight, who is defending that portion of the decree appealed from, was a stockholder and a director in the institutes and the mother-in-law of Dr. Hughes.

August 1, 1929, Hughes and the institutes entered into a contract with Thomas D. Randall and Carroll Valthor, doing business as Randall and Valthor, for the construction of a one hospital building

on lots 50, 51 and 52. Afterward Randall and Vagtborg entered into a number of sub-contracts for the construction of the hospital, two of which were with the Economy Plumbing & Heating company, whereby the latter agreed to install plumbing and sewerage for $13,200 and the heating system for $8,800, or a total of $22,000; this work was done to the satisfaction of all, and the Economy company in addition did extra work for which it is agreed it was to be paid $1160; the work was completed July 23, 1930, and for it the Economy company was to be paid $23,160; it has received but $4,000, leaving a balance of $19,160.

It appears that almost from the beginning of the construction of the hospital, building the Sanitarium was in financial difficulties and from that time a number of plans were proposed to raise money to pay for the hospital building but none of them was successful, so that a great many claims for work done and material furnished are still due and unpaid. The Sanitarium and Dr. Magnus have since gone through bankruptcy.

April 15, 1930, the U. S. Gypsum Co. filed its petition fora mechanic's lien in the Circuit court of Cook county and on August 19, 1930, the Economy company filed its intervening petition in that proceeding to foreclose its mechanic's lien for $19,160; it alleged that on August 13, 1930, it served its notice for mechanic's lien on the owners of the property.

Some time afterward a committee representing creditors who had furnished labor and material on the building was formed. On June 28, 1933, more than three years after the Circuit court proceeding was instituted, the committee filed its bill in the Superior court to foreclose a bond issue of $50,000, the bonds being dated June 15, 1930; it appears there was but $12,503.15 due under the bond issue. Afterward Mrs. Habenicht filed her cross bill in the Superior court suit to foreclose a trust deed on the south half of lot 50 and lots

on lots 50, 51 and 52. Afterward Kendall and Vaughtery entered into a number of sub-contracts for the construction of the hospital, two of which were with the Economy Plumbing & Heating Company, whereby the latter agreed to install plumbing and sewerage for $13,500 and the heating system for $6,800, or a total of $22,300; this work was done to the satisfaction of all, and the Economy company in addition did extra work for which it is agreed it was to be paid $1150; the work was completed July 28, 1930, and for it the Economy company was to be paid $23,150; it has received but $4,000, leaving a balance of $19,150.

It appears that about from the beginning of the construction of the hospital building the contractors ran in financial difficulties and from that time a number of plans were proposed to raise money to pay for the hospital building but none of them was successful, so that a great many claims for work done and material furnished are still due and unpaid. The contractors and Dr. [illegible] have since gone through bankruptcy.

April 15, 1930, the H. S. Dyrness Co. filed its petition for mechanic's lien in the circuit court of Cass county and on August 19, 1930, the Economy company filed its intervening petition in that proceeding to foreclose its mechanic's lien for $19,150; it alleged that on August 14, 1930, it served its notice for mechanic's lien on the owners of the property.

Some time afterward a committee representing creditors who had furnished labor and material on the building was formed. On June 28, 1933, more than three years after the circuit court proceeding was instituted, the committee filed its bill in the superior court to foreclose a mech. lien of $50,000, the funds being dated June 15, 1930; it appears there was but $12,502.15 due under the mech. lien. Afterward Mr. Schmidt filed her cross bill in the superior court suit to foreclose a trust deed on the south half of lot 50 and lots

51 and 52. It is alleged the trust deed was given to secure an indebtedness of Dr. Magnus incurred June 29, 1928, for $20,000, evidenced by two principal notes, one for $5,000 and one for $15,000, with interest at 6%; that these notes were due on or before October 1, 1928, and that they were given for a portion of the unpaid purchase price. In the meantime Joe Kominsky and Charles Ross, who had been doing business as partners under the name of Economy Plumbing & Heating Company, caused a corporation, the Economy Plumbing & Heating Company, Inc., to be organized to continue the business. This corporation filed its answer in the nature of an intervening petition in the Superior court case. A number of other parties filed claims for mechanic's liens in the two cases, the Circuit court case was referred to a master of that court and the Superior court case to a master of the latter court. After some evidence had been taken orders were entered transferring the Superior court case to the Circuit court and the causes were consolidated and disposed of as one case, but one decree being entered.

A number of mechanic's lien claims were allowed and a number of others disallowed. The question of the priority of some of them was by the decree reserved for future consideration.

While not important in this case, yet we think we ought to say that the decree, which consists of 89 typewritten pages in the record, might have been much shortened if the provisions of paragraph 3, section 64 of the Civil Practice act had been followed. The record (pleadings, evidence, exhibits, master's report and decree) is voluminous.

The master in his report recommended the disallowance of the Economy Company's claim both as a partnership and as a corporation and gave a number of reasons therefor. They were incorporated in the decree and we shall consider them.

51 and 52. It is alleged the trust deed was given to secure an indebtedness of Dr. Regina incurred June 25, 1923, for $2,000, evidenced by two principal notes, one for $1,000 and one for $15,000, with interest at 6%; that these notes were due on or before October 1, 1924, and that they were given for a portion of the unpaid purchase price. In the meantime Joe Kominsky and Charles Hope, who had been doing business as partners under the name of Economy Plumbing & Heating Company, caused a corporation, the Economy Plumbing & Heating Company, Inc., to be organized to continue the business. This corporation filed its answer in the nature of an intervening petition in the superior court case. A number of other parties filed claims for mechanic's liens in the two cases, the circuit court case was referred to a master of that court and the superior court case to a master of the latter court. After some evidence had been taken orders were entered transferring the superior court case to the circuit court and the cases were consolidated and disposed of as one case, but one decree being entered.

A number of mechanic's lien claims were allowed and a number of others disallowed. The question of the priority in time of them was by the decree reserved for future consideration.

While not important in this case, yet we think it worth to say that the decree, which consists of 9 typewritten pages in the record, might have been much shortened if the provisions of paragraph 3, section 64 of the civil practice act had been followed. The record (pleadings, evidence, exhibits, master's report and decree) is voluminous.

The master in his report recommended the disallowance of the Economy Company's claim but as a partnership and as a corporation and gave a number of reasons therefor. They were incorporated in the decree and we shall consider them.

The master found that the Economy company on October 16, 1930, waived all claims for liens by executing a written waiver. The written waiver is in the record and is in the usual form. It recites that in consideration of $15,304 the Ecomony company waives its right of lien, and that the balance due on Economy company's contract is $3900. The evidence shows that the $15,304 was paid by delivering debenture bonds for that amount to the Economy company; that no part of these debentures has ever been paid; that the debentures were executed pursuant to a proposed agreement to be entered into by all the creditors of the Sanitarium; that the waiver was delivered by the Economy company to Victor P. Frank, one of the parties to the proposed agreement for settlement of all the claims against the Sanitarium, with the understanding that the waiver was not to be delivered to the owners of the property unless and until the deal was consummated, and that a considerable time after the delivery of the written waiver Frank, through mistake, delivered it to the owners of the property. The evidence further shows that a number of creditors refused to become parties to the settlement agreement.

The waiver, having been conditionally delivered and the condition never having been performed, was not binding on the Economy company, and its claim for lien was not waived. We think the finding of the master and the chancellor is against the evidence.

The master also found, as did the decree, that the Economy company waived its claim for lien by becoming a party to an agreement of February 27, 1931, whereby it agreed not to institute any mechanic's lien or other proceeding to enforce its claim for lien. The written agreement was drawn up in an endeavor to settle all the sub-contractors' claims against the property. The Sanitarium, Dr. Magnus, Vagtborg and Ross, who were designated in the contract as the committee, and Central Manufacturing District Bank signed the agreement, and it was also to

The master found that the Economy company on October 16, 1924, waived all claims for liens by executing a written waiver. The written waiver is in the record and is in the usual form. It recites that in consideration of $15,000 the Economy company waives its right of lien, and that the balance due on Economy company's contract is $4000. The evidence shows that the $15,000 was paid by delivering debentures bonds for that amount to the Economy company; that no part of these debentures has ever been paid; that the debentures were executed pursuant to a proposed agreement to be entered into by all the creditors of the contractors; that the waiver was delivered by the Economy company to Victor P. Frank, one of the parties to the proposed agreement for settlement of all the claims against the contractors, with the understanding that the waiver was not to be delivered to the owners of the property until the deal was consummated, and that a considerable time after the delivery of the written waiver Frank, through mistake, delivered it to the owners of the property. The evidence further shows that a number of creditors refused to become parties to the settlement agreement.

The waiver, having been conditionally delivered and the condition never having been performed, was not binding on the Economy company, and its claim for lien was not waived. We think the finding of the master and the chancellor is contrary to the evidence.

The master also found, as did the lower, that the Economy company waived its claim for lien by executing a receipt on the 27th of February 27, 1921, thereby it waived and relinquished any mechanic's lien or other proceeding to enforce its claim for lien. The written agreement was drawn up in an endeavor to settle all the sub-contractors' claims against the property. The contractors, Mr. Hughes, Hughes and Hoag, who were associated in the contract in the counties, and Harvard Manufacturing District Land Company the owner, and it was also to

be signed by the creditors.

The evidence shows that by a former agreement the Sanitarium agreed to pay 35% to the creditors in cash, which had not been done; that it had been unable to pay for the construction of the building, and that it agreed to turn over the hospital to the committe to be operated, etc., the income to be distributed to the creditors; that upon demand by the committee the creditors were to dismiss all proceedings to enforce their liens then pending. Some of the creditors, including the Economy company, signed the agreement; the Economy company showed the amount of its claim to be $2800; several refused to sign; the matter fell through, all efforts to refinance the Sanitarium failed and it was adjudged a bankrupt November 9, 1933; Dr. Magnus was also adjudged a bankrupt November 1, 1933. Some of the claimants, including the Economy company, proceeded to prove up their claims in the proceedings in which they filed their intervening petition. Under the facts as disclosed by the evidence, we think the proposed agreement of February 27, 1931, was never carried out and that the Economy company did not waive its claim for lien by signing it.

The master also found that the Economy company did not serve a proper notice of lien upon the owner. The notice was dated August 14, 1930, within a month after the last work done by the Economy company; it was addressed to the Sanitarium, Dr. Magnus and Thomas D. Randall, one of the original contractors; it stated that the Economy company, a corporation, had been "employed by Thomas D. Randall to furnish plumbing, sewerage and heating", and the master found the notice was insufficient because Thomas D. Randall was not the original contractor, but that Thomas D. Randall and Harold Vagtborg, doing business as Randall and Vagtborg, were the original contractors. The two contracts made by the Economy company were signed by Thomas D. Randall, whereas the general contractor was the partnership of

be signed by the creditors.

The evidence shows that by a tripartite agreement the building agreed to pay 30% to the creditors in cash, which had not been done; that it had been unable to pay for the construction of the building, and that it agreed to turn over the hospital to the creditors to be operated, etc., the income to be distributed to the creditors; that upon demand by the committee the creditors were to dismiss all proceedings to enforce their liens then pending. None of the creditors, including the Economy company, signed the agreement; the Economy company viewed the matter as if it were to be done; several refused to sign; the matter fell through. All efforts to reinstate the hospital failed and it was closed a contract October 8, 1933; Mr. Magnus was also appointed a contract December 1, 1933. None of the claimants, including the Economy company, proceeded to prove up their claims in the probate court; they filed their intervening petition. Under the facts as disclosed by the evidence, we think the proposed agreement of February 27, 1931, was never carried out and that the Economy company did not waive its claim for lien by signing it.

The master also found that the Economy company did not serve a proper notice of lien upon the owner. The notice was dated August 14, 1930, which is month after the last work done by the Economy company; it was addressed to the Building, Mr. Magnus and Thomas H. Randall, one of the original contractors; it stated that the Economy company, a corporation, had been "employed by Thomas H. Randall to furnish plumbing, heating and heating", and the master found the notice was insufficient because Thomas H. Randall was not the original contractor, but that Thomas H. Randall and Harold Wardwell, doing business as Randall and Wardwell, were the original contractors. The two contracts made by the Economy company were signed by Thomas H. Randall, whereas the general contractor was the partnership of

Randall and Vagtborg. We think this objection is hypercritical and without merit. United Cork Companies v. Volland, 365 Ill. 564. Moreover, no notice was required for the reason that Randall and Vagtborg delivered to the owners, Dr. Magnus and the Sanitarium, a sworn statement in accordance with section 5 of the Mechanic's Lien Act, which showed the Economy company to be one of the subcontractors and the amount of its contract to be $22,204.

The master also found, as did the decree, that the Economy company's claim for lien should not be allowed because the claim was then being prosecuted by the Economy company, a corporation organized on August 4, 1930, and that its claim was based on an assignment of the claim by Kominsky and Ross doing business as the Economy Plumbing & Heating Company, a partnership alleged to have been formed on August 5, 1930; that the notice of claim for lien was served August 14, 1930, in the name of the corporation, while the answer in the nature of an intervening petition claiming a lien, was filed by the partnership August 19, 1930; that on that day the claim was owned by the corporation and should have been filed by it. We think this finding is exceedingly refined and in a degree hypercritical and altogether unwarranted.

The original petition of the Economy company for a lien was filed August 19, 1930; its work was completed July 23, 1930. The Economy company, a corporation, filed an amended petition by leave of court May 25, 1937, showing it was the assignee of the Economy company, a partnership; in all other respects the original and amended petitions were identical. We think the amended petition cured the technical defect and related back to the time of the filing of the original intervening petition, and that the finding of the master and the decree that the Economy company, a corporation, did not file its claim within the statutory period is without merit.

In United Cork Companies v. Volland, 365 Ill. 564, a proceed-

Randall and Vaughters. We think this objection is hypertechnical and without merit. United York Companies v. Williams, 361 Ill. 554. Moreover, no notice was required for the reason that Randall and Vaughters delivered to the owners, Dr. Hague and the Institution, a sworn statement in accordance with section 5 of the Mechanic's Lien Act, which showed the Economy company to be one of the sub-contractors and the amount of its contract to be $22,[illegible].

The master also found, as did the jury, that the Economy company's claim for lien should not be allowed because the claim was then being prosecuted by the Economy company, a corporation organized on August 4, 1[illegible], and that its claim was based on an assignment of the claim by [illegible] and was doing business as the Economy Plumbing & Heating Company, a partnership alleged to have been formed on August 5, 1[illegible]; that the notice of claim for lien was served August 14, 1[illegible], in the name of the corporation, while the answer in the nature of an intervening petition claiming a lien, was filed by the partnership August 19, 1[illegible]; that on that day the claim was owned by the corporation and should have been filed by it. We think this finding is exceedingly refined and in a degree hypertechnical and altogether unwarranted.

The original petition of the Economy company for a lien was filed August 17, 1930; its work was completed July 25, 1930. The Economy company, a corporation, filed an amended petition by leave of court May 25, 1937, showing it was the assignee of the Economy company, a partnership; in all other respects the original and amended petitions were identical. We think the amended petition cured the technical defect and related back to the time of the filing of the original intervening petition, and that the finding of the master and the decree that the Economy company, a corporation, did not file its claim within the statutory period is without merit.

In United York Companies v. Williams, 365 Ill. 565, a proceed-

ing to enforce a mechanic's lien, in reply to the contention that the statute providing for a mechanic's lien must be stricyly construed, the court said (p. 372): "The doctrine of strict construction was never meant to be applied as a pitfall to the unwary, in good faith pursuing the path marked by the statute, nor as an ambuscade from which an adversary can overwhelm him for an immaterial misstep. Its function is to preserve the substantial rights of those against whom the remedy offered by the statute is directed." The court then refers to sections 7 and 9 of the Act and continuing said: "These provisions of the statute disclose a manifest legislative intent to remove, as far as practicable, technical requirements as a material element of the right to enforce a valid lien, and to clarify questions touching the materiality of the steps prescribed by the statute. A salient provision is that no lien shall be defeated because of unintentional error."

Upon a consideration of the entire record it appears that the Economy company performed its two contracts to the satisfaction of everyone; that there is still due and unpaid to it $19,160; that all the several plans for the settlement of all the claims of creditors of the Sanitarium fell through, and that the propositions mentioned in each of them are not binding on the Economy company. It is true it has received $15,304 debentures, and although they are worthless and were worthless all the time they should be returned, as the Economy company has offered to do.

We hold that the Economy company is entitled to a mechanic's lien, and accordingly that part of the decree of the Circuit court of Cook county appealed from is reversed and the matter remanded with directions to allow the Economy Company's claim.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

ing to enforce a mechanic's lien, in reply to the contention that the statute providing for a mechanic's lien must be strictly construed, the court said (p. 172): "The doctrine of strict construction was never meant to be applied as a pitfall to the unwary, in good faith pursuing the path marked by the statute, nor as an escape from which an adversary can overwhelm him for an immaterial mistake. Its function is to preserve the substantial rights of those against whom the remedy offered by the statute is directed." The court then refers to sections 7 and 9 of the Act and continuing said: "These provisions of the statute disclose a manifest legislative intent to remove, as far as practicable, technical requirements as a material element of the right to enforce a valid lien, and to clarify questions touching the materiality of the steps prescribed by the statute. A salient provision is that no lien shall be defeated because of unintentional error."

Upon a consideration of the entire record it appears that the Economy company performed its two contracts to the satisfaction of everyone; that there is still due and owing to it $13,[illegible]; that all the several plans for the settlement of all the claims of creditors of the Sanitarium fell through, and that the propositions mentioned in each of them are not binding on the Economy company. It is true it has received $13,304 [illegible], and although they are worthless and were worthless all the time they should be returned, as the Economy company has offered to do.

We hold that the Economy company is entitled to a mechanic's lien, and accordingly that part of the decree of the circuit court of Cook county sustaining it is reversed and the matter remanded with directions to allow the Economy Company's claim.

REVERSED AND REMANDED WITH DIRECTIONS.

McGuire, P. J., and Scott, J., concur.

40480

WILMA E. KINNEY,
Appellant,

vs.

PHILIP C. LINDGREN et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

22A

300 I.A. 610

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This case has already been before us, and in an opinion rendered June 13, 1938, we reversed the decree and remanded the cause. (296 Ill. App. 635.) When the case was remanded plaintiff moved to redocket it and asked for a new trial; the court, after examining our opinion, held in effect that it decided all the issues in the case against the plaintiff and denied the motion to redocket and for a new trial, and entered a decree approving the trustees' account and dismissing plaintiff's complaint as to certain defendants.

Without repeating all the facts as stated in our former opinion, it is enough to say that plaintiff filed a complaint asking for an accounting against the defendants, as trustees under a trust agreement dated January 13, 1922, which trust was created by plaintiff's mother; the complaint alleged that at the time of the execution of the trust agreement her mother turned over to the two trustees certain mortgage bonds; that from time to time the moneys invested in these bonds were reinvested by the trustees and that this continued for many years; that plaintiff's mother died July 2, 1924, and plaintiff became 21 years of age November 23, 1935. The complaint in substance charged that the two trustees, Fred P. Heitman and Philip C. Lindgren, in flagrant violation of the trust, purchased bonds from the Heitman Trust Company, a corporation in which they were the principal officers, well knowing that the bonds were worth considerable less than the face value at the time of their purchase, and that the trustees have charged the estate the

ELLA K. KIRKEY,
Appellant,

vs.

PHILIP C. HIRSCHEN et al.,
Appellees.

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS.

MR. PRESIDING JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

This case was already been before us, and in an opinion rendered June 15, 1933, we reversed the decree and remanded the cause. (299 Ill. App. 535.) When the case was remanded plaintiff moved to redocket it and asked for a new trial; the court, after examining our opinion, held in effect that it decided all the issues in the case against the plaintiff and denied the motion to redocket and for a new trial, and entered a decree approving the trustees' account and dismissing plaintiff's complaint as to certain defendants.

Without repeating all the facts as stated in our former opinion, it is enough to say that plaintiff filed a complaint asking for an accounting against the defendants, as trustees under a trust agreement dated January 15, 1922, which trust was created by plaintiff's mother; the complaint alleged that at the time of the execution of the trust agreement her mother turned over to the two trustees certain mortgage bonds; that from time to time the moneys invested in these bonds were reinvested by the trustees and that this continued for many years; that plaintiff's mother died July 2, 1924, and plaintiff became 21 years of age November 24, 1935. The complaint in substance charged that the two trustees, Fred P. Hotman and Philip C. Hirschen, in flagrant violation of the trust, purchased bonds from the Hotman Trust Company, a corporation in which they were the principal officers, well knowing that the bonds were worth considerable less than the face value at the time of their purchase, and that the trustees have charged the estate the

full face value of the bonds, plus interest; the complaint described the specific bonds which it was alleged defendant trustees had purchased. The cause was referred to a master who took evidence and filed a report, finding that the material allegations of plaintiff's complaint had been proven. Fred P. Heitman having died, an order was entered that the suit proceed against Ella G. Heitman, as executrix; objections and exceptions were filed to the master's report, which were overruled, and a decree was entered in accordance with the recommendations of the master; the decree ordered that plaintiff recover from defendants $12,284.13. It is that decree which was reversed by this court.

In The People v. Waite, 243 Ill. 156, 160, it was held that when a cause was remanded generally it was not open in the trial court as to questions presented by the record and decided by the court of appeals; that "The judgment of this court as to all the points and questions presented and decided forever concluded the parties and they could not be reconsidered by the county court." The Supreme court further held that if no specific directions are given in the remanding order, "it must be determined from the nature of the case what further proceedings would be proper and not inconsistent with the opinion;" that "it is the duty of the court to which the cause is remanded, to examine the opinion and proceed in conformity with the views expressed in it." To the same effect is Roggenbuck v. Breuhaus, 330 Ill. 294, 297. Plaintiff cites cases where the right to trial by jury was involved, which hold that where the judgment is reversed and the cause is remanded the lower court must proceed to a hearing de novo. These cases are not applicable.

In our prior opinion we reviewed the evidence and held "that all the evidence shows that the settlor, Mrs. Kinney, knew all of the mortgage bonds were being purchased from the Heitman Trust Co.

full face value of the bond, plus interest; the assignee be-
ariled the receipt, bonds which it was claiming delivered in case
had purchased. The court was referred to a master who took evi-
dence and filed a report, finding that the material allegations of
plaintiff's complaint had been proven. Prof. J. Milton Laing
died, an order was entered that the bank present equities file b.
Heitman, as executrix; but before the exceptions were filed in the
master's report, which had already confirmed, and a decree was entered in
accordance with the recommendations of the master; the court ordered
that plaintiff recover from defendants [illegible]. It is that de-
cree which was reversed on this court.

In Van Sterle v. Fitch, 243 Ill. 185, 190, it was held that
when a case was reversed generally it was not open in the trial
court as to questions presented by the record and decided by the
court of appeals; that "the judgment or this court so in all the
points and questions presented and decided fully concluded the
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of the case and further proceedings should be opened and not incon-
sistent with the opinion;" that "it is the duty of the court to
which the cause is remanded, to execute the opinion and proceed in
conformity with the views expressed in it." In the case at bar in
Hogenbrock v. Kimball, 252 Ill. 164, 167, [illegible] where
were the right to trial by jury was involved, which held that
where the judgment is reversed and the cause is remanded the lower
court must proceed in a manner de novo. These cases are not ap-
plicable.

In our view opinion we reviewed the evidence and held "that
all the evidence tends to show that a petition, Mrs. Kinney, knew all of
the mortgage bonds were being purchased from the Heitman Trust Co.

and that she wanted this continued until her daughter became 21 years of age;" that she had been one of the customers of the Heitman company from time to time and had purchased securities from it; that by the trust agreement she authorized the trustees to control and manage the trust property, "to exchange, sell, convert and reconvert, invest and reinvest" the trust property as might be considered by the trustees convenient or expedient; that it was expressly provided that the trust agreement should continue until the settlor's daughter was 21 years of age.

We found that "There is no evidence, nor even a suggestion, that the trustees did not follow the instructions given them in the trust agreement."

We noted that plaintiff's mother, the settlor, died in 1924; that plaintiff's bill, filed January 24, 1935, charged the trustees had violated their duties by purchasing bonds of little or no value, paying the full face value for them; that this charge, while not eliminated from the pleading, was abandoned on the hearing; and it was not until May 4, 1936, nearly 12 years after her mother died, and about four years after plaintiff attained her majority, that she first sought to repudiate the purchase of the bonds. We held that "There is no evidence or suggestion that the bonds were not worth face value when purchased, and the fact that at the time of filing the suit they were of little or no value does not tend to show that defendants acted in bad faith in purchasing the bonds."

All the matters which were urged by plaintiff on the prior appeal were considered and decided by this court in the opinion rendered. Under such circumstances plaintiff was not entitled to a new trial, as the merits and law applicable were decided by us.

The decree ordered that defendants were entitled to the sum of $1469 as reasonable compensation for their services, and that plaintiff pay to Philip C. Lindgren this amount, and that upon failure so to do execution issue.

and that she wanted this continued until her daughter became 21 years of age; that she had been one of the directors of the Holtzman company from time to time and discussed conveying this it; that by the trust agreement she authorized the trustees to control and manage the trust property, "to exchange, sell, convert and reconvert, invest and reinvest" the trust property as might in considered by the trustees correctlent or convenient; that it was expressly provided that the trust agreement should continue until the settlor's daughter was 21 years of age.

We found that "there is no evidence, nor even a suggestion, that the trustees did not follow the instructions given them in the trust agreement."

We noted that plaintiff's mother, the settlor, died in 1924; that plaintiff's bill, filed January 24, 1925, charged the trustees had violated their duty by purchasing bonds of little or no value, paying the full face value for them; that the trust, while not all invested from the plaintiff, was [illegible]; and it was not until May 6, 1926, [illegible] 11 years after the settlor died, and about four years after plaintiff attained her majority, that she first sought to repudiate the purchase of the bonds. We held that "there is no evidence or suggestion that the bonds were not worth face value when purchased, nor that [illegible] of filing the suit they were of little or no value. [illegible] to show that defendants acted in bad faith in purchasing the bonds."

All the matters which were urged by plaintiff on the prior appeal were considered and decided by this court in the decision rendered. Under such circumstances plaintiff was not entitled to a new trial, as the merits and the applicable rules were decided by us.

The decree ordered that defendants have statutory fees of $1400 as reasonable compensation for their services, and that plaintiff pay to Philip C. Friedman this amount, and that upon failure so to do execution issue.

It was further ordered that the clerk of the court, with whom all the bonds and coupons of the trust have been deposited pursuant to the orders of the court, shall return to Philip C. Lindgren, surviving trustee, all of such bonds and securities, to be held by him until the sum of $1469 allowed to him shall have been paid, and upon payment of this amount he shall turn over and deliver all the securities to plaintiff. Upon questioning of counsel for the defendants, all parties being represented, counsel agreed on behalf of his clients to waive any and all claim for services and agreed that all the provisions of the decree allowing anything to the defendants as compensation for their services may be stricken from said decree, and that the defendants be ordered to turn over to plaintiff all said securities.

The decree will be affirmed in all respects except as to the provision for compensation to the defendant trustees, which provision is hereby reversed, and the trustee is ordered to turn over and deliver all the securities in his possession belonging to Wilma E. Kinney to her.

The decree is affirmed in part and reversed in part and the cause is remanded with directions to revise the decree as ordered by this opinion; costs of this appeal to be divided equally between the parties.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Matchett and O'Connor, JJ., concur.

It was further argued that the items of the model, with which all the [illegible] of the [illegible] have been discussed pursuant to the notice of the meeting, would require a public [illegible]. Industry, economic growth, all of such things and necessities, to be held by the [illegible] the [illegible] [illegible] [illegible] [illegible] been paid, for such payment of this account to [illegible] [illegible] deliver all the [illegible] to [illegible]. Upon [illegible] of counsel for the [illegible], all parties being represented, [illegible] agreed on behalf of his clients to enter into an [illegible] for services and agreed that all the [illegible] of the [illegible] anything in the [illegible] or [illegible] [illegible] may be stated from [illegible], and that the [illegible] be [illegible] to turn over to [illegible] all [illegible].

The [illegible] will be [illegible] in all [illegible] [illegible] to the [illegible] for [illegible] [illegible], which provides in [illegible] [illegible], [illegible] [illegible] [illegible] over and deliver all the [illegible] in his possession [illegible] to [illegible] [illegible].

The [illegible] is [illegible] in part [illegible] [illegible] the cause is remanded with [illegible] to [illegible] [illegible] [illegible] by this opinion; costs to [illegible] equally between the parties.

[illegible]
[illegible]

McInnett and O'Connor, JJ., concur.

40529

LESTER D. SUMMERFIELD,
Appellee,

vs.

HAROLD A. CLARK,
Appellant.

THE FIRST NATIONAL BANK OF CHICAGO, a national banking association and corporation, and CHICAGO RAWHIDE MANUFACTURING COMPANY, an Illinois corporation,
Garnishees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

3 B A

300 I.A. 610

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Harold A. Clark, defendant, appeals from a judgment of $3000 entered after trial by the court of plaintiff's claim for attorney's fees based on a contract between the parties.

Plaintiff is an attorney of Reno, Nevada, whom defendant, resident in Florida, retained in divorce proceedings to be brought in Nevada; the present action was brought in Chicago in order to attach defendant's money in The First National Bank of Chicago and the Chicago Rawhide Manufacturing Company; subsequently defendant made a cash deposit with the clerk of the Municipal court to support any judgment, and these garnishees were dismissed.

Defendant first says that plaintiff's services rendered in Reno were useless and unnecessary because plaintiff was advised that defendant's domicile was in Miami Beach, Florida, but that plaintiff loosely and improperly advised defendant that if he should stay six weeks in Reno any divorce obtained thereafter in Nevada would be valid in any state in the Union.

In March, 1937, defendant lived in Miami Beach, Florida, with his wife and three children; there were unhappy differences between him and his wife; he went to Reno, Nevada, and consulted plaintiff with reference to securing a divorce. Defendant in this

HARVEY E. GOLDSMITH,
Appellee,

vs.

EDGAR A. GOLDS,
Appellant.

THE FIRST NATIONAL BANK OF CHICAGO, a national banking association and corporation, and CHICAGO TITLE AND TRUST COMPANY, an Illinois corporation,
Garnishees.

IN THE CIRCUIT COURT
PRESIDING DEN CAMPBELL OF THE COURT.

Gerald A. Clare, attorney, appeals from a judgment of $3000 entered after trial by the court of plaintiff's claim for attorney's fees based on a contract between the parties.

Plaintiff is an attorney of Reno, Nevada, whom defendant, resident in Florida, retained in divorce proceedings to be brought in Nevada; the present action was brought in Chicago in order to attach defendant's money in the first national bank of Chicago and the Chicago Title and Trust Company; subsequently defendant paid a cash deposit with the clerk of the municipal court to support any judgment, and these garnishees were dismissed.

Defendant first came into plaintiff's auto in Reno were matters and unnecessarily because plaintiff was advised that defendant's domicile was in West Palm, Florida, but that plaintiff loosely and improperly advised defendant that it be should stay six years in Reno as a divorce obtained therefrom in Nevada would be valid in any state in the union.

In March, 1937, defendant lived in West Palm, Florida, with his wife and three children; there were marital difficulties between him and his wife; he went to Reno, Nevada, and consulted plaintiff with reference to securing a divorce. Defendant in this

court argues that plaintiff advised defendant wrongfully with reference to the validity of a Nevada divorce.

We do not pass upon this point for the reason that there are some differences of opinion on this subject in the decided cases, but more especially because there is a direct conflict in the testimony as to what plaintiff advised defendant in this respect. Plaintiff testified that defendant told him he intended to establish a permanent residence in Reno, Nevada; that plaintiff told him the bill for divorce could be filed at the expiration of six weeks residence, but that it would be better to live in Reno six months; but that if the wife entered her appearance in the case, any decree rendered would be valid and entitled to full faith and credit under the constitution of the United States. Defendant testified he told plaintiff he intended to resume his permanent domicile in Florida after the divorce residence of six weeks had expired.

The trial court, who saw and heard the witnesses testify, held with plaintiff in his version of what was said, and we cannot say this was manifestly wrong.

We hold the judgment must be reversed for the reason that the contract upon which this action is founded was secured by plaintiff while defendant was his client, by representations made by plaintiff which were coercive in their nature as not representing fairly the situation.

Plaintiff testified that in his conversation with defendant in March, 1937, he told him he could not fix his fees in advance of a contested action; that he would charge a retainer of $250 at that time and, in the event the case was not contested, another $250, making a fee of $500; apparently this was agreeable to defendant.

The bill for divorce was filed in Reno May 7, 1937; in the

court argues that plaintiff advised defendant frankly with reference to the validity of a credit divorce.

We do not pass upon this point for the reason that there are some differences of opinion on this subject in the decided cases, but more especially because there is a direct conflict in the testimony as to what plaintiff advised defendant in this respect. Plaintiff testified that defendant told him he intended to establish a permanent residence in Reno, Nevada; that plaintiff told him the bill for divorce could be filed at the expiration of six weeks residence, but that it would be better to live in Reno six months; but that if he did so he would be sure to win the case, and defendant testified would be willing and anxious to fulfill faith and credit under the constitution of the United States. Defendant testified he told plaintiff he intended to remove his permanent domicile in Florida after the divorce residence of six weeks had expired.

The trial court, who saw and heard the witnesses testify, held with plaintiff in his version of what was said, and we cannot say this was manifestly erroneous.

We hold the judgment must be reversed for the reason that the contract made with this action is founded and accepted by plaintiff while defendant was his client, by representations made by plaintiff which were effective in their nature to induce defendant to rely fairly the attorney.

Plaintiff testified that in his conversation with defendant in March, 1927, he told him he could not take the divorce of a contested action; that he would obtain a resident of Reno at that time and, in the event the case was not contested, another 2250, making a fee of $500; and that this was agreeable to defendant.

The bill for divorce was filed in Reno May 7, 1927; in the

meantime defendant's wife had filed a bill for separate maintenance in a Florida court. July 2nd plaintiff wrote to defendant a letter concerning his fees; it was a long letter, very adroitly and persuasively written; it stressed the value of plaintiff's services; that the Nevada action should be tried before the Florida case was tried; that he, plaintiff, is carrying the burden of the litigation; he warned defendant that he "is involved in a very complicated mess"; that the case is a "tough one" for defendant; that plaintiff has seen thousands of such cases and has never seen "a plaintiff husband with a tougher case to prevail in than yours"; that in spite of this defendant can ultimately win, although it is going to be a real hard battle; the advantages of proceeding with the Nevada action are set forth with some particularity. It is stated in the letter that it is customary in Reno for the plaintiff "in a case involving circumstances similar to yours" to pay to his attorney three times the amount allowed by the court to counsel for the defendant wife, and this is explained and argued at some length; he assures defendant that he is trying to be more than fair and that he is going to make the charge twice the amount paid to the attorneys for the wife; that he has been paid larger fees than this in cases that were not contested; there is an expression of a desire to discuss the fees no further, as plaintiff must give his undivided attention to the merits of the case. He then informs defendantthat the Nevada court has allowed for the wife's counsel in his case, as preliminary fees, $5500. The letter again stresses the fact that plaintiff would carry the burden of the litigation; that plaintiff would credit the amount of $500 already paid him and that defendant must pay him $10,000 when he pays the $5000 to the attorneys for the wife. Much more is said about the reasonableness of the fee and the "substantial concessions" made by plaintiff, a hope that defendant will feel quite satisfied with the charge plaintiff is

meantime defendant's wife has filed a bill for separate maintenance in a Florida court. Duly and promptly wrote to defendant a letter concerning his fees; it was a long letter, very serious and persuasively written; it stressed the value of plaintiff's services; that the Nevada action cannot be tried before the Florida case was tried; that he, plaintiff, is carrying the burden of the litigation; he stressed definitely that by "it involved in a very complicated mess"; that the case is a "tough one" for defendant; that plaintiff has seen thousands of such cases and has never seen "a plaintiff husband with a tougher case to prevail in some power"; that in spite of this defendant can ultimately win, although it is going to be a real hard battle; the advantages of proceeding with the Nevada action are set forth with some particularity. It is stated in the letter that it is customary in Reno for the counsel "in a case involving circumstances similar to yours" to pay to his attorney three times the amount allowed by the court to counsel for the defendant wife, and this is explained and stressed at some length; he assures defendant that he is trying to be more than fair and that he is going to work the courts twice the amount paid to the attorneys for the wife; that he has been paid larger fees than this in cases that were not contested; there is an explanation of a legitimate to disease the fees so further, as plaintiff must give his undivided attention to the merits of the case. In that letter defendant the Nevada court has allowed for the wife's counsel in this case, as preliminary fees, $5000. The letter again stressed the fact that plaintiff would carry the burden of the litigation; that plaintiff would credit the amount of $500 already paid him and that defendant must pay him $10,000 when he pays the $5000 to the attorney for the wife. Much more is said about the inconvenience of the law and the "substantial concessions" made by plaintiff, a hope that defendant will feel quite satisfied with the charge. Plaintiff is

making and will say, "That is fine and is all right." There is also a suggestion that if the court makes a further allowance to the wife's attorneys plaintiff will be paid twice the amount of such additional allowance.

July 7, 1937, defendant replied to this letter, saying he considered the charges exhorbitant. He suggests that in addition to what has been paid $1000 would probably be a fair amount; that he had discussed plaintiff's letter with his Florida attorney who advised that plaintiff's charges should be lowered.

July 10th plaintiff wrote defendant arguing at some length for his position and stating that if defendant did not wish him to go ahead plaintiff should be paid $5000 for services to date and substitute other counsel, but that substitution of reputable counsel would not ordinarily be made until the attorney of record has been paid; that the Nevada case could not be abandoned as long as the wife had appeared; that she could proceed and have an adjudication in her favor which would be binding upon Clark everywhere. Defendant replied to this, saying he wished the plaintiff to continue to handle the case on the basis that defendant pay plaintiff the same amounts that the Nevada court ordered paid to Mrs. Clark's attorneys. It is on the basis of plaintiff's letters and this letter of defendant of July 16th that the present action is based.

In August, 1937, Clark and his wife, through their attorneys in Florida, settled their differences and in August she was granted a divorce in the Florida court; thereupon plaintiff was instructed to dismiss the Nevada action. Plaintiff testified that the order of dismissal was entered in the Nevada action and that that court ordered there be paid by Clark to counsel for his wife $5000; that plaintiff secured from the Nevada court a reduction of this amount to $3000. In the present action plaintiff seeks from defendant a like amount of $3000, based upon defendant's letter of July 16th.

making and will say, 'Here is time and it all counts.' There is also a suggestion that if the court makes a counter allowance to the wife's attorneys plaintiff will be paid below the amount of such additional allowance.

July 7, 1927, defendant replied to this letter, saying he considered the charges exorbitant. He suggests that in addition to what one item paid also would probably be a fair amount; that he had discussed plaintiff's letter with his private attorney who advised that plaintiff's charges could be lowered.

July 10th plaintiff wrote defendant stating at some length for his position and asking that if defendant did not wish his to do so plaintiff would be paid $[illegible] for services to date and substitute other counsel, but that substitution of repleadings would not ordinarily be made until the attorney of record was paid; that the Davenport case could not be conducted as long as the wife had opposed; that one court proceed and have an adjudication in her favor which would be binding upon clients everywhere. Defendant replied to this, saying he wished the plaintiff to continue to handle the case on the usually best terms; that plaintiff the same amounts that the Davenport court ordered paid to his. Client's accounts. It is on the basis of plaintiff's letters and this letter of defendant of July 10th that the present action is based.

In August, 1927, after the suit-site, through their attorneys in Florida, settled their differences and in August she granted a divorce in the Florida court; whereupon plaintiff was instructed to discontinue the Nevada action. Plaintiff contends that the order of dismissal was entered in the Nevada action on the first court ordered there be paid by client to counsel for his wife $[illegible]; that plaintiff secured from the Florida court a reduction of his amount to $300. In the present action plaintiff sues for defendant a like amount of $300, based upon defendant's letter of July 10th.

It has long been the established rule that where the relation of attorney and client exists it must always be regarded as one of special trust and confidence, and that any contract between them must be scrutinized with great closeness. As was said in Morrison v. Smith, 130 Ill. 304, 316, "So strict is the rule on this subject, that dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, that is to say, the burden is not upon the client to establish fraud and imposition, but the burden rests upon the attorney to show fairness, adequacy and equity. Jennings v. McConnell, 17 Ill. 148." This has been cited with approval in Pratt v. Kerns, 123 Ill. App. 86; Boyle v. Read, 138 Ill. App. 153; Elmore v. Johnson, 143 Ill. 513, 524; Ringen v. Ranes, 263 Ill. 11, 17; Feeney v. Runyan, 316 Ill. 246, 250; In re Kolb, 362 Ill. 190; and Masterson v. Wall, 365 Ill. 102, 110.

Reading the entire letters of July 2 and July 10, 1937, written by plaintiff to his client, Clark, leaves the impression that, while there is nothing in them which might be characterized as patently untruthful, yet they are so colored as to have a coercive influence upon the recipient. There are the suggestions that the Nevada case must precede any action in the Florida court, and that if he, plaintiff, should withdraw as attorney from the case Clark must pay $5000 before any reputable attorney would succeed him; there is also a covert threat as to what might happen if Clark should dismiss his Nevada action; and all through the letters there runs an undue stress on the necessity of retaining Summerfield's services. They adroitly tend to create a feeling of fear in Clark that he is in a precarious situation - a "tough ** mess."

We hold these letters do not present a fair and candid picture of the situation and that defendant's agreement, as indicated in his letter of July 16th, was obtained by the exaggerated

It has long been the established rule that where the pleadings of attorney and client varied in most slight by inserting an one of minutes [illegible] and conflicting, and that any conflict between them must be reconciled in a [illegible] manner. As was said in Harrison v. Spring, 1 Ky. 124, 126, "no error is more rife on this subject, than allowing themselves to [illegible] the [illegible] are bound, as against the attorney, to be [illegible] facts, that is to say, the [illegible] is not upon the subject of [illegible] fraud and imposition, but the [illegible] to the attorney to [illegible] adequacy and equity. [illegible] v. [illegible], 17 Ky. 124. This has been cited with approval in [illegible] v. [illegible], 1[illegible] Ky. [illegible]; [illegible] v. [illegible], 185 Ky. 1[illegible]; [illegible] v. [illegible], 185 Ky. 3[illegible], 324; [illegible] v. [illegible], [illegible] Ky. 1[illegible], 12, 17; [illegible] v. [illegible], [illegible] Ky. 3[illegible], 340; [illegible], [illegible] Ky. [illegible]; and [illegible] v. [illegible], [illegible] Ky. 1[illegible], 1[illegible].

Reading the entire letters of July 2 and July 10, 1[illegible], written by plaintiff to his attorney, Clark, leaves one impression that, while there is nothing in them which might be construed as partially authorized, yet they, are so clouded as to have a coercive influence upon the recipient. There are the suggestions that the Kevada case would produce any action in the Florida court, and that if the plaintiff, should [illegible] as [illegible] the case Clark must pay $500.00 before any [illegible] attorney [illegible] case; there is also a covert threat as to what [illegible] if Clark should dismiss his Kevada action; and [illegible] the letters there runs an undue stress on the necessity of [illegible] the plaintiff's services. They certainly tend to create a [illegible] of fear in Clark that he is in a precarious situation - a "[illegible] case."

We hold these letters do not present a fair [illegible] picture of the situation and that defendant's [illegible], as indicated in his letter of July 12[illegible], was [illegible] of the [illegible]

and somewhat obscure picture of the situation portrayed by plaintiff, amounting to coercion. As pointed out by counsel for defendant, the bill filed on behalf of Clark in the Nevada court was a simple, one-page document charging cruelty.

It also should be said that defendant could reasonably conclude, from his first conversation with plaintiff touching fees, that in the event the suit was not contested plaintiff's entire fee was to be $500. While plaintiff testified that he performed certain other services for defendant, this suit is based solely upon the contract with reference to services in the divorce proceeding.

Defendant has filed a counterclaim asking damages for alleged want of skill and diligence on the part of plaintiff. The trial court correctly found against this. Negligence or want of professional skill on the part of plaintiff was not proven.

In his letter of July 7th defendant says that in his opinion, in addition to the amount paid to plaintiff, $1000 would probably be a fair amount. We are inclined to take defendant at his word. The judgment entered by the trial court is reversed and judgment for plaintiff against defendant for $1000 is entered in this court.

REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

Matchett and O'Connor, JJ., concur.

and somewhat obscure phrase of the litigation contained by plaintiff, amounting to overplay. As pleaded out by counsel for defendant, the bill (like on behalf of same in the court) was a simple, one-page document over 1.. credit.

It also should be said that defendant could reasonably conclude, from the first conversation with plaintiff time ago here, that in the event the suit was not successful plaintiff's entire fee was to be lost. While plaintiff therefore may be performed certain other services for defendant, this suit is based solely upon the contract with reference to services in the divorce proceeding.

Defendant has filed a counterclaim seeking damages for alleged want of skill and diligence on the part of plaintiff. The trial court correctly found against this. Negligence or want of professional skill on the part of plaintiff was not proven.

In his letter of July 7th defendant says that in his opinion, in addition to the amount paid on account, since would probably be a fair amount. We are troubled to take exception at his word. The judgment entered by the trial court is reversed and judgment for plaintiff against defendant for $[illegible] is entered in this court.

REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

Hatchett and O'Connor, JJ., concur.

40523

PEOPLE OF THE STATE OF ILLINOIS ex rel. OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

vs.

HOME BANK AND TRUST COMPANY, a Corporation.

BEATRICE NOWAKOWSKI et al., Appellees,

vs.

E. E. MUELLER, Receiver of Home Bank and Trust Company, Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

300 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Auditor of Public Accounts appointed a receiver of the Home Bank and Trust Company, a banking corporation of this State, and afterward filed a suit in the Circuit court of Cook county to liquidate the bank, which suit is still pending. Afterward a number of persons who owned "Certificates of Indebtedness" executed by the owners of certain real estate in South LaGrange, Illinois, for which the Home Bank and Trust Company was acting as trustee, filed their intervening petition contending they were entitled to pro rate with all of the certificate holders in $20,000 which the bank had some time prior appropriated to the payment of some of the certificates held by it. After the issue was made up the matter was referred to a master in chancery who took the evidence, made up his report and recommended that the contention of the certificate holders be sustained and a decree entered accordingly. The receiver's objections to the report were overruled by the master, a decree entered in accordance with the prayer of the petition of the certificate holders, and the receiver appeals.

The record discloses that three persons owned some real

PEOPLE OF THE STATE OF ILLINOIS
ex rel. PAUL ZEMLIN, Auditor
of Public Accounts of the State
of Illinois,

vs.

BOND AVE. NAT. BANK COMPANY, a
Corporation.

BEATRICE NORDGREN et al.,
Appellees,

vs.

E. C. MORRILL, Receiver of the
Bank and Trust Company,
Appellant.

Mr. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

The Auditor of Public Accounts appointed a receiver of the Bond Ave. Bank and Trust Company, a banking corporation of this State, and afterward filed a suit in the Circuit court of Cook county to liquidate the bank, which suit is still pending. Alleging a number of persons who owned "certificates of indebtedness" issued by the owners of certain real estate in South Chicago, Illinois, for which the Bond Ave. Bank and Trust Company was acting as trustee, filed their intervening petition and claiming they were entitled to pro rata with all of the certificate holders in the fund under the bank had some time prior appropriated to the payment of some of the certificates held by it. After the issue was made up the matter was referred to a master in chancery who took the evidence, made his report and recommended that the intervention of the certificate holders be sustained and a decree entered accordingly. The receiver's objections to the report were overruled by the master, a decree entered in accordance with the prayer of the petition of the certificate holders, and the receiver appealed.

The record discloses that three persons owned some real

estate in South LaGrange and on April 15, 1927, executed a deed of trust to the bank as trustee, on the same day executed what is designated a declaration of trust to the bank of the same property, and ten days thereafter, April 25, 1927, the three owners also executed 120 "Certificates of Indebtedness" for $500 each, due on or before April 25, 1930. The real estate was pledged as security for the indebtedness and a number of the certificates were sold to the public. Some time thereafter the bank, at the request of the three beneficial owners of the real estate, sold part of the property for $22,000 and after paying a real estate broker $2000 for bringing about the sale applied the remaining $20,000 to the payment of 40 certificates then held and owned by the bank. The certificates were cancelled and delivered by the bank to the makers thereof. Some time after this was done, the time of payment of the certificates remaining unpaid was extended for a period of three years, that is until April 25, 1933. The extension agreement was dated April 25, 1930. It provided, "The time of payment of Certificate of Indebtedness *** [apparently the certificates were numbered from 1 to 120] for $500.00 attached hereto, is hereby extended by mutual agreement to Apr. 25, 1933, with interest at seven (7) per cent per annum, payable semi-annually, which interest is evidenced by six interest coupons for $17.50 each, hereto attached and signed with the facsimile signatures of Charles H. Glashagel and Arthur N. Sanquist, who are the present owners of the property conveyed to secure the payment of the Cert. of Ind. herein described and interest thereon. The parties hereto mutually agree to pay said Cert. of Ind. when demanded, and agree that all of the provisions, stipulations, powers and agreements in said Cert. of Ind. and in the Trust Agreement securing payment thereof contained, shall remain in full force and effect except as herein in express terms changed and modified, and be binding upon the undersigned in the same manner as

estate in South Kensington and on April 14, 1927, executed a deed of trust in the form as follows, in the same by which it was is designated a declaration of trust in the name of the same property, and ten days thereafter, April 24, 1927, the same owners also executed an "Agreement to indemnifyment" for such use, and on or before April 28, 1927. The deed which was placed as security for the indemnification and a number of the certificates were sold to the public. Upon this transfer the same, at the request of the three beneficial owners of the real estate, said part of the property for [illegible] and after paying a real estate broker about for bringing about the sale holding the remaining [illegible] to the payment of 40 certificates that said [illegible] by the same. The certificates were delivered and delivered by the same to the owners thereof. [illegible] after this [illegible], the time of payment of the certificates [illegible] the [illegible] for a period of three years, that is until April 28, 1930. The attention agreement was dated April 28, 1930. It provided, "[illegible] of certificates of indebtedness [illegible] the certificates were [illegible] from 1 to [illegible] for [illegible] and [illegible], in [illegible] by mutual agreement to [illegible], [illegible], with interest at seven (7) per cent per annum, payable [illegible], which [illegible] is evidenced by six interest coupons for [illegible] each, [illegible] attached and signed with the facsimile signatures of [illegible], Clemmyn and Arthur R. [illegible], the [illegible] of owners of the property convey to secure the payment of the [illegible], of Ind. [illegible] and interest thereon. The parties hereto [illegible] agree to pay said Corp. of Ind. [illegible] and agree that all of the provisions, stipulations, covers and agreements in said Corp. of Ind. and in the first Agreement [illegible] contained, shall [illegible] in full force and effect except as herein in [illegible] and modified, and be binding on the undersigned in the same manner as

if they had signed said Cert. of Ind. and trust deed."

This extension agreement was signed by the two owners of the property, the third owner having theretofore disposed of his interest to them, and it was also signed by the bank as "Agent for Owner of said Bond." Shortly before the execution of the extension agreement, which was after the bank had applied the $20,000 above mentioned in payment of the certificates or bonds, the bank between April 3, 1930, and June 25, 1930, purchased all of the outstanding certificates except certificate number 19 and thereby became the owner of them. At various times thereafter it sold these certificates to the public at large and most of such certificates continued to be owned by such purchasers, although a few of the certificates were resold by such purchasers, and the intervening petitioners in the instant case are the owners of the certificates except that certificate number 19 is owned by another intervenor.

The evidence shows that after the bank purchased the certificates between April 3, 1930, and June 25, 1930, and resold them, the several purchasers thereof were not informed by the bank and had no knowledge that part of the property had been sold and the proceeds applied toward the payment of the certificates held by the bank. The master found it was the duty of the trustee, the bank, to inform the purchasers of any material change in the status of the trust, and not having done so the purchasers were entitled to claim their proportionate share of the $20,000. The master's report was approved in all things by the chancellor. We agree with this conclusion. All of the real estate (and the proceeds derived from the sale of any part of it) was pledged to secure the payment of all of the certificates. They were on a parity and the bank was not warranted in applying the $20,000, the net proceeds derived from the sale of part of the real estate, to payment of certificates held by the bank itself. All the certificate holders should have been treated alike (and this

if they had signed said note, or not, and trade them."

This extension agreement was signed on the 3rd return of the property, the bank owner holding worthless interest of his interest to them, and it was also signed by the bank as "agent for owner of said bond." Shortly before the expiration of the extension agreement, which was after the bank had applied the payments mentioned in payment of the certificate in bonds, the bank between April 3, 1933, and June 23, 1933, purchased all of the outstanding certificates except certificate number 19 and thereby became the owner of them. At various times thereafter it sold these bonds to the public at large and took of such certificates conditional to be issued by such purchasers, although a few of the certificates were issued by such purchasers, and the intervening purchasers in the instant case are the owners of the certificates except that certificate number 19 is owned by another intervenor.

The evidence shows that after the bank purchased the certificates between April 3, 1933, and June 23, 1933, and prior thereto, the several purchasers thereof were not informed by the bank nor had no knowledge that sale of the property had been sold and the proceeds applied toward the payment of the certificates held by the bank. The master found it was the duty of the trustee, the bank, to inform the purchasers of any material change in the status of the trust, and not having done so the purchasers were entitled to claim their proportionate share of the $80,000. The master's report was approved in all things by the Chancellor. We agree with his conclusion. All of the real estate (and the proceeds derived from the sale of any part of it) was pledged to secure the payment of all of the certificates. They were on a parity and the bank was not entitled to applying the $80,000, the net proceeds derived from the sale of part of the real estate, to payment of certificates held by the bank itself. All the certificate holders should have been treated alike (and this

was not changed by the fact that after the bank had applied the $20,000 toward the payment of certificates held by it, it purchased the outstanding certificates and resold them) for the reason that the extension agreement which was attached to the certificates when they were resold expressly stated that the owners of the property who had executed the certificates, "are the present owners of the property conveyed to secure the payment of the Cert. of Ind." described; and it further expressly stated that alll the provisions, powers and agreements in the certificates "and in the Trust Agreement securing the payment thereof" should remain in full force and effect except as changed and modified by the extension agreement. This extension agreement did not state the fact that part of the real estate had been sold and the proceeds derived therefrom applied toward the payment of other certificates owned by the bank. And for the same reasons, we think the owner of certificate number 19 is entitled to the same relief as the other certificate holders; there was attached to his certificate the same extension agreement as that attached to every other certificate.

It is also contended that the court erred in allowing petitioners' preferred claims against the receiver because "there is no proof of any funds paid by any of the petitioners in purchase of their certificates having been traced into or identified as part of the assets of the Bank which have come into the hands of this Receiver." In support of this the cases of People v. State Bank of Maywood, 354 Ill. 519, and Colegrove & Co. Bank v. Gaupp, 357 Ill. 499, are cited. And it was held in those cases that the claims were not preferred.

In the Maywood case it was held that a depositor of a bank which was being liquidated was not entitled to a preference but must share pro rata with the bank's general creditors.

In the Gaupp case a preferred claim was allowed against the

was not changed by the fact that after the town had issued the $50,000 towards the payment of certificates held by it, it purchased the outstanding certificates at twenty cents for the reason that the extension agreement which was issued by the certificate when they were treated separately stands upon a footing of the property who had executed the certificates, "are the present owners of the property conveyed to secure the payment of the city, at law." Inscribed; and it further appears, that all the provisions, powers and agreements in the certificates "and in the trust agreement securing the payment thereof" should remain in full force and effect except as changed and modified by the extension agreement. This extension agreement did not affect the legal title of the real estate and been held not the relations existing between supplied towards the payment of other obligations owing by the bank. And for the same reason, we think the owner of certificate number 19 is entitled to the same relief as the other certificate holders; there was attached to his certificate the same extension agreement as that attached to every other certificate.

It is also contended that the court erred in allowing participants" preferred claims against the receiver because "there is no proof of any funds paid by any of the participants in purchase of their certificates having been traced into or identified as part of the assets of the Ross Block Bank when in the hands of the Receiver." In support of this contention the case of Kerr v. Bank of Maywood, 234 Ill. 512, and Wightman v. Gen. Trust, 247 Ill. 429, are cited. But it has been held in more recent cases that claims were not preferred.

In the Maywood case it was held that a depositor of a bank which was being liquidated was not entitled to a preference but must share pro rata with the bank's general creditors.

In the Trust case a preferred claim was allowed against the

receiver of a private bank. In that case there was a trust agreement entered into by a partnership which conducted a private bank and which later became incorporated. In that case the court said: (p. 504) "The State bank never at any time had the trust fund, or any part of it, in its possession or custody, nor was it ever in control of such fund, nor did it ever exercise or attempt to exercise any dominion over the fund."

We think neither of these cases is in point. The $20,000 was not deposited in the bank but was a trust fund received by the bank which belonged ratably to all the certificate holders. The bank had possession of this $20,000 and apparently used it for its own purpose. We think it was not necessary that the funds be traced to the hands of the receiver. People v. Bates, 351 Ill. 439; People ex rel. Nelson v. Chicago Bank of Commerce, 275 Ill. App. 68.

A further contention is made by the receiver that petitioners' claims were barred by the 5 year Statute of Limitations and also by orders entered by the court in the liquidation proceeding fixing the time within which claims should be filed. The statute relied upon is par. 16, chap. 83, Ill. Rev. Stats. 1937, which provides that certain actions on unwritten contracts shall be commenced within five years next after the cause of action accrued, and it is argued that the statute commenced to run not later "than the time of appointment of the Receiver of the Bank, or the institution of the liquidation proceeding in July, 1932;" it is alleged in the receiver's answer that the court entered an order September 10, 1935, barring all claims not filed prior to September 30, 1935, and that since petitioners purchased their certificates in May and June, 1930, and did not file their intervening petition until October 11, 1937, their claims were barred by the statute as well as by the order of court. We are unable to agree with either of these contentions. The evi-

receiver of a private bank. [illegible] ment without loss by a receiver in spite of a private bank and which later became insolvent. [illegible] (p. 324) "The [illegible] over of [illegible] the bank [illegible], or any part of it, [illegible] or banking, nor was it ever in control of such funds, nor did it ever exercise or attempt to exercise any authority over the same."

In which respect of these cases is it point. The [illegible] was not deposited in the bank but was a [illegible] fund received by the bank under [illegible] relation to its [illegible] business. The bank had possession of this [illegible] and it for its own purposes. We think it was not necessary that the funds be traced to the bank of the insolvent. [illegible] v. [illegible], 321 Ill. 429; [illegible] v. [illegible], [illegible] 73 Ill. App. 66.

A further examination is made by the receiver that petitioners' claims were barred by the 3 year statute of limitations and also by orders entered by the court in the [illegible] proceeding fixing the time within which claims should be filed. [illegible] should [illegible] 16, [illegible] 85, Ill. Ann. Stats. 1937, which provides that certain actions on contract, contracts shall be commenced within five years next after the cause of action accrued, and it is argued that the statute commenced to run not later than the time of commencement of the receiver of the bank, or the institution of the liquidation proceeding in July, 1932. It is alleged in the receiver's answer that the bank ceased to exist September 11, 1932, leaving all claims not filed prior to September 30, 1932, and that some petitioners purchased their certificates in May and June, 1932, and did not file their intervening petition until October 11, 1937. Their claims were barred by the statute as well as by the order of court. We are unable to agree with either of these contentions. The evi-

dence shows the intervenors did not learn until shortly before they filed their petition, that the bank had not disclosed all the facts to them when they purchased their certificates. We think the statute did not commence to run until they had knowledge of the facts. State Bank & Trust Co. v. Comm. Tr. & Savgs. Bank, No.40443, App. Court, 1st Dist., opinion filed May 22, 1939; Pa. Co. for Ins. v. 9th Bank & Trust Co., 306 Pa. 148; Duckett v. Mechanics' Bank, 86 Maryland, 400.

We are also of opinion that since the liquidation proceeding was pending the court had the right to permit the intervenors to file their petition, although it was not filed within the time specified in the court's order. The matter was entirely within the discretion of the court and we think the discretion was not abused.

The decree appealed from ordered that the Receiver make payment to the intervening petitioners or their attorney within ten days. We think the time should not have been so limited but the court should have decreed that the payments be made in due course of administration; accordingly the decree is amended in this respect and affirmed in all others.

The decree of the Circuit court of Cook county is modified and affirmed as modified.

DECREE MODIFIED AND AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

dence above the intervenor did not learn until nearly seven days filed their petition, that he had not indicated an intent to them when they purchased their activities. To bring the statute did not commence to run until they had knowledge of the facts. Bailey Bank & Trust Co. v. Jones, 12 N. J. Super. 1, 8, Am. Dorr, 1st dist., aff'd, 8 N.J. 1, 1950; Cf. Ex. Ex. v. Fifth Ward Trust Co., 100 Va. 145; Liggett v. Montgomery Ward, 86 Maryland, 499.

To use this statutory rule, under the limitation proceeding was permit the owner and the right to secure the intervenors to file their petition, although it was not filed within the specified in the county court. The right the filing petition the discretion of the owner and in using the discretion was not abused.

The decree upon its from entered upon the receiver made payment to the intervening petitioners or their attorney within ten days. To which the time should not have been or filing the suit should have formed that the payment to be made in the course of administration; accordingly the decree is modified in this respect and affirmed in all respects.

The costs of the circuit court of this county is modified and affirmed as modified.

Decree modified and affirmed.

Respectfully, R. J., and Kalbfleisch, J., dissent.

40752

CLARENCE BAUMANN,
Appellee,

vs.

AMANDA B. GORE,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

300 I.A. 611

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries sustained by him through the alleged negligence of defendant in driving her automobile, causing a collision between the automobile and a three-wheel motorcycle driven by plaintiff. The declaration was in two counts, the first charging general negligence and the second wilful and wanton misconduct. At the close of plaintiff's case the court directed the jury to return a verdict finding defendant not guilty as to the charges made in the second count, which was accordingly done. Defendant then put in her evidence and the case was submitted to the jury. The jury found in favor of defendant, and in addition to the general verdict a special interrogatory was submitted, viz., "Was the plaintiff Clarence Baumann guilty of contributory negligence which was the proximate cause of his injuries?" The answer in the affirmative was signed by each of the twelve jurors. Plaintiff filed a motion for a new trial which was allowed, the court stating that "his only reason for doing so is because he is of the opinion that he erred in giving instruction Number 13." The court at the same time set aside the special finding of the jury and the directed verdict entered as to count two, "because he could not grant a new trial on Count I without also granting a new trial on Count II."

Upon petition by defendant we granted her leave to appeal from the order awarding the new trial, etc.

The record discloses that at about 1:30 p. m. November 16,

40752

CLARENCE DAUGHTY,
Appellee,

vs.

AMANDA A. COOK,
Appellant.

APPEAL FROM BUCHANAN COUNTY
DISTRICT COURT.

FOR PUBLICATION

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries sustained by him through the alleged negligence of defendant in driving her automobile, during a collision between the automobile and a three-wheel motorcycle driven by plaintiff. The defendant was in two counts, the first count was general negligence and the second willful and wanton misconduct. At the close of plaintiff's case the court directed the jury to return a verdict finding defendant not guilty of the charge made in the second count, which the court thought lacking. Defendant then put in her evidence and the case was submitted to the jury. The jury found in favor of defendant, and in addition to the general verdict a special interrogatory was submitted, viz., "Was the plaintiff Clarence Daughty guilty of contributory negligence which was the proximate cause of his injuries?" The answer in the affirmative was signed by each of the twelve jurors. Plaintiff filed a motion for a new trial which was sustained, the court stating that "the only reason for doing so is because he is of the opinion that he erred in giving instruction Number 14." The court in the same line set aside the special finding of the jury and the directed verdict entered as to count two, "because he could not grant a new trial on Count I without also granting a new trial on Count II."

Upon petition by defendant we granted her leave to appeal from the order sustaining the new trial, etc.

The record discloses that at about 1:30 p. m. November 10,

1937, plaintiff was driving a three-wheel motorcycle south in Hinman avenue between Church and Davis streets in Evanston. Church and Davis streets run east and west and intersect Hinman avenue at right angles; Church street is one block north of Davis street, the latter being the principal business street in Evanston. There are "stop" and "go" lights at Davis street and apparently at Church street also. The day was bright and clear and the pavement dry. Defendant lived in an apartment building located at the northwest corner of Hinman avenue and Davis street. There was a garage in connection with the building and defendant was driving her Ford automobile in the private driveway to the north of the building east into Hinman avenue. Automobiles were parked on each side of the roadway of Hinman avenue - bumper to bumper. The motorcycle and the car collided and plaintiff sustained a fracture of the bones of his leg; he was taken to a hospital where he received attention.

Plaintiff, 24 years old, testified he entered Hinman avenue about two or three blocks north of Church street; that just south of Church street he was going from 25 to 30 miles an hour in the west driveway of Hinman avenue; that the traffic was light; there were cars parked on each side of the roadway in Hinman avenue close together; that as he came south, and when he was about 175 feet north of Davis street, the lights for Davis street showed red; that he was familiar with the street and the fact that there was a garage and private roadway leading to it in connection with the building in which defendant lived; that he was employed by the Pure Oil Products company "picking up, loading and delivering cars, tires and batteries at its filling station at Davis and Hinman streets in Evanston; that his place of employment was at the southeast corner of Hinman avenue and Davis street; that when a short distance north of the private driveway he was going about 18

1937, plaintiff was driving a tractor-trailer south on Hanson avenue between Carson and Davis streets in Symmetry. Carson and Davis streets run east and west and intersect Hanson avenue at right angles; Carson street is one block north of Davis street, the latter being the principal business street in Symmetry. There are "stop" and "go" lights at Davis street and incidentally at Carson street also. The day was bright and clear and the pavement dry. Defendant lived in an apartment building located at the northwest corner of Hanson avenue and Davis street. Close by a garage in connection with the building and defendant was driving her ford automobile in the private driveway to the north of the building east into Hanson avenue. Automobiles are parked on each side of the roadway of Hanson avenue - danger to concur. The motorcycle and the car collided and plaintiff sustained a fracture of the bones of his leg; he was taken to a hospital where he received attention.

Plaintiff, 23 years old, testified he entered Hanson avenue about two or three minutes before on Carson street; that just south of Carson street he was going from 40 to 50 miles an hour in the west driveway of Hanson avenue; that the traffic was light; there were cars parked on each side of the roadway in Hanson avenue close together; that he came south, and then he was about 175 feet north of Davis street, the little for Davis street showed red; that he was familiar with the street and the fact that there was a garage and private roadway leading to it in connection with the building in which defendant lived; that he was employed by the Pure Oil Products company "picking up, looking for delivering cars, tires and batteries at the filling stations in Davis and Hanson streets in Symmetry; that his place of employment was at the southeast corner of Hanson avenue and Davis street; that when a short distance north of the private driveway he was going about 18

or 20 miles an hour; that he first saw defendant's automobile when he was about 15 feet north of the driveway - "It was pulling out in front of the parked cars about a foot"; that defendant, Mrs. Gore, started to turn north in Hinman and was going about 5 or 10 miles an hour; that when he first saw Mrs. Gore's car he was traveling about 15 miles an hour and at the time of the impact about 8 or 10 miles an hour; that the collision caused the motorcycle to tip over, "bent the fork and front," and he was thrown up in the air.

Wendell Colbert, a chauffeur called by plaintiff, testified that he saw the collision; that he was sitting in an automobile which was parked facing north on the east side of Hinman avenue; that there was not much traffic in Hinman avenue at the time; that he first saw the motorcycle when it was at about Church street coming south at about 25 or 30 miles an hour; that he saw Mrs. Gore's car coming east on the private driveway; that she stopped her car on the west side of the sidewalk before coming out into the street; that she then started up and was going about 5 miles an hour, "going slow," when the motorcycle was 15 or 20 feet away. The motorcycle slowed down when it got about 15 feet from the automobile; it was then going from 15 to 18 miles an hour; that in the collision the motorcycle was thrown across the middle of the street and "slid along east."

Harvey Larsen, a seventeen-year old schoolboy, called by plaintiff, testified that at the time he was working at a hotel a little north of the private driveway on the east side of Hinman avenue; that he saw the collision; that he first saw defendant's Ford car coming out on the driveway when it was about a foot from the west edge of the sidewalk, and the motorcycle was then some distance north coming south at about 28 to 30 miles an hour; that when plaintiff got a short distance north of the driveway he slowed down; that the Ford was coming out at from 5 to 8 miles an hour;

or 30 miles an hour; that he first saw defendant's automobile when he was about 15 feet north of the driveway - he was walking out in front of the parked car thus: I saw"; that defendant, Mrs. Cory, started to turn north in Lincoln and was going about 3 or 10 miles an hour; that when he first saw Mrs. Cory's car he was traveling about 15 miles an hour and at the time of the impact about 5 or 10 miles an hour; that the collision occurred the motorcycle to tip over, "but the fork had first," and he was thrown up in the air.

Wendell Culbert, a disinterested witness, testified that he saw the collision; that he was driving in an automobile which was parked facing north on the east side of Lincoln Avenue; that there was not much traffic in Lincoln Avenue at the time; that he first saw the motorcycle when it was at least 300 feet coming south; it was 20 or 30 miles an hour; that he saw Mrs. Cory's car coming out of the driveway; that she stopped her car on the west side of the sidewalk before coming out into the street; that she then started up and was going about 3 miles an hour, "going slow," when the motorcycle was 15 or 20 feet away. The motorcycle slowed down when it got about 15 feet from the automobile; it was then going from 15 to 18 miles an hour; just in the collision the motorcycle was thrown across the middle of the street and "laid along east."

Harvey Larsen, a seventeen-year old schoolboy, called by plaintiff, testified that at the time he was coming, on a canal a little north of the private driveway on the east side of Lincoln Avenue; that he saw the collision; that at first the defendant's ford car coming out on the driveway then it was about a foot from the west edge of the sidewalk, and the motorcycle was then some distance north coming south at about 20 to 30 miles an hour; that when plaintiff got a short distance north of the driveway he slowed down; that the ford was coming out at from 5 to 8 miles an hour;

that Mrs. Gore started to turn north in Hinman avenue; that just before the collision the motorcycle was going from 15 to 20 miles an hour; that plaintiff put on his brakes and swerved to the east or left.

Two police officers, Hildebrecht and Mueller, employed by the City of Evanston and assigned to the "Accident Prevention Bureau" arrived at the scene of the collision shortly after it occurred, but it is not clear what the situation was at that time. One of the officers testified that Hinman avenue at the place in question was 35½ feet from curb to curb; that Mrs. Gore was at the scene when they arrived.

These officers also testified in substance that in February 1938, they were present at a proceeding in the Municipal court of Evanston and heard plaintiff there testify that at the time of the collision he was driving at about 25 miles an hour; that when they arrived at the scene of the accident Officer Hildebrecht saw the witness Colbert, and Colbert at that time said plaintiff was driving his motorcycle at from 30 to 35 miles an hour at the time of the collision; that after making the investigation the officer went to the hospital and talked with plaintiff, who then told him he was going from 33 to 35 miles an hour.

Mrs. Gore testified that as she came out of the driveway she was going from 3 to 5 miles an hour; that before she crossed the sidewalk she made a complete stop and blew her horn. There is evidence that no one heard her automobile horn, and that plaintiff did not sound his horn as he approached the scene.

Plaintiff was called in rebuttal and testified that the officers came to the hospital shortly after the accident and told him they had to make a report, and that he said, "Well, put down anything. I don't like to talk about it now," and that was all he said. He further testified that in the Municipal court case he testified he

that Mrs. Gore started to turn north in Clinton avenue; that just before the collision the motorcycle was going from 25 to 30 miles an hour; that plaintiff got on his crutch and arrived to the east or left.

Two police officers, Gildersleeve and Martin, employed by the City of Brooklyn and detailed to the "Accident Prevention Bureau" arrived at the scene of the collision shortly after it occurred, but it is not clear just the collision was at that time. One of the officers testified that Mrs. Gore was at the place in question was 30 feet from curb or more; that Mrs. Gore was at the scene when they arrived.

These officers also testified in substance that in February 1938, they were present at a proceeding in the municipal court of Brooklyn and heard directly. There testify that at the time of the collision he was driving at about 25 miles an hour; that when they arrived at the scene of the collision Officer Gildersleeve was the witness Gaidart, the officer at least like said plaintiff was driving his motorcycle at from 20 to 25 miles an hour at the time of the collision; that after making the investigation the officer went to the hospital and talked with plaintiff, who then told him he was going from 25 to 30 miles an hour.

Mrs. Gore testified that as she came out of the driveway she was going from 3 to 5 miles an hour; that before she crossed the sidewalk she made a complete stop and then her motor. There is evidence that no one heard her motorcycle horn, and that plaintiff did not sound his horn as he approached the scene.

Plaintiff was called in rebuttal and testified that the officers came to the hospital shortly after the accident and told him they had to make a report, but that he said, "Wait, put down anything. I don't like to talk about it now," and that was all he said. He further testified that in the municipal court case he testified he

was going about 25 miles an hour but that they did not there ask him whether he slowed down or what his speed was at the time of the impact.

Plaintiff contends that the court properly awarded a new trial and set aside the directed verdict as to the willful and wanton charge made in the second count of the declaration, because the evidence was sufficient to warrant the court in submitting the question of such negligence to the jury; and the case of Walldren Express Co. v. Krug, 291 Ill. 472, and other cases are cited. In the Walldren case the court said: "Whether the negligent conduct of a defendant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury."

In the instant case we are clear there was no evidence from which it could legitimately be inferred that the conduct of defendant was sufficient "to show such a gross want of care as to indicate a willful disregard of consequences or a willingness to inflict injury." The evidence all shows that defendant drove her Ford car out of the garage, stopped at the west side of the sidewalk and then proceeded slowly into the street. The evidence was wholly insufficient to show such negligence on the part of defendant as would amount to a reckless disregard of the consequences. Schoenbacher v. Kadetsky, 290 Ill. App. 28. The court properly directed a verdict on the second count at the close of plaintiff's case, and it was error to set the directed verdict aside even if the court was of opinion there was prejudicial error in the record as to the issues raised by the first count and defendant's answer thereto.

Defendant contends that because the evidence showed plaintiff was guilty of contributory negligence as a matter of law, the court

was going about 30 miles an hour; it took they did not turn and him whether is about down or that his speed was at the time of the impact.

Plaintiff contends that the court properly received a new trial and set aside the directed verdict as to the original defendant Watson on the ground of the destruction, because the evidence was sufficient to warrant the court in submitting the question of such negligence to the jury; and the case of Baldwin Machine Co. v. Ariz., 241 Ill. 422, and other cases are cited. In the Baldwin case the court said: "Whether the negligence of a defendant which has resulted in injury to another accounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury."

In the instant case we are clear there was no evidence from which it could legitimately be inferred that the conduct of defendant was sufficient "to show such a gross want of care as to indicate a willful disregard of consequences or a willingness to inflict injury." The evidence all shows that defendant drove his Ford car out of the garage, stopped at the west side of the sidewalk and then proceeded slowly into the street. The evidence was wholly insufficient to show such negligence on the part of defendant as would amount to a reckless disregard of the consequences. Schoenbacher v. Lindsay, 260 Ill. 4m. 26. The court properly directed a verdict on the second count at the close of plaintiff's case, and it was error to set the directed verdict aside even if the court had of opinion that there was prejudicial error in the record as to the instruction relied by the first count and defendant's answer thereto.

Defendant contends that because the evidence showed plaintiff was guilty of contributory negligence as a matter of law, the court

improperly awarded a new trial. We are unable to agree with this contention. We are of opinion, however, that the overwhelming weight of the evidence shows that plaintiff was guilty of contributory negligence and that no verdict could stand on this phase of the case except one for defendant. But in this view the law requires that the case be submitted to a jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206. The case was submitted to the jury, it found in favor of defendant and specifically found that plaintiff was guilty of contributory negligence.

But plaintiff contends it was prejudicial error for the court to give instruction number 13 requested by defendant, and therefore the court properly awarded a new trial. Instruction number 13 is: "If you find that the defendant Amanda B. Gore before emerging from the private driveway brought her automobile to a complete stop immediately prior to driving onto the sidewalk or into the sidewalk area extending across said private driveway and if you further find that cars were so closely parked along the west side of Hinman avenue on the north side of said private driveway that the defendant Amanda B. Gore could not see the plaintiff until she had driven out into and entered Hinman avenue, then, if you so find, you are further instructed that although the defendant Amanda B. Gore's view was obscured by parked cars she was not required to again stop after crossing the sidewalk or the sidewalk area extending across said private driveway and before entering Hinman avenue, because the same danger which would require her to stop would prevent her from again starting." We think this instruction is clearly wrong because it singled out certain evidence, and it was further error for the court to tell the jury that Mrs. Gore was not required to again stop after crossing the sidewalk, etc. The jury should have been left free to consider all the evidence and pass on the question as to the conduct of Mrs. Gore.

improperly granted a new trial. It was unable to accomodate both contention. In the at bar, however, there was overwhelming weight of the evidence upon that plaintiff was guilty of contributory negligence and that no verdict could be had on the power of the case cannot be for defendant, but in this view the law requires that the case be submitted to a jury. Ilgen, supra & Libby v. Cook, 52 Cal. 274. The case was submitted to the jury, it found in favor of defendant and specifically found that plaintiff was guilty of contributory negligence.

The plaintiff contends it was prejudicial error for the court to give instruction number 12 requested by defendant, and therefore the court properly granted a new trial. Instruction number 12 is: "If you find that the defendant Angela M. Ore-more escaped from the public driveway brought her automobile to a complete stop immediately prior to driving onto the sidewalk or into the sidewalk area extending across said private driveway and if you further find that care was to exercise looking to the west side of Gibson avenue on the part of said private driveway that the defendant exercised. Ore. could not see the plaintiff until she had driven out into the sidewalk Gibson avenue, then, if you so find, you are further instructed that although the defendant assumed P. Ore's view was obscured by parked cars she did not required to begin stop after crossing the sidewalk or the sidewalk area extending across said private driveway and before entering Gibson avenue, because the most danger which requires her to stop could prevent her from begin starting." In view this instruction is clearly wrong because it assumed but certain evidence, and it was further error for the court to tell the jury that Mrs. Ore was not required to begin stop after crossing the sidewalk, etc. The jury should have been left free to consider all the evidence and rule on the question as to the conduct of Mrs. Ore.

We are of opinion, however, that the court should not have awarded a new trial in view of all the evidence in the case because, as above stated, no verdict could stand except one in favor of the defendant since the overwhelming weight of the evidence shows plaintiff was guilty of contributory negligence. The court gave the jury twenty instructions - many more, we think, than should be given in a case of this kind - and upon a consideration of them we think the jury, in view of the fact that the issues were simple and easily understood, was not misled.

The judgment of the Superior court of Cook county is reversed and the cause remanded with directions to enter judgment on the verdict as rendered.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., concurs.

Matchett, J.: I concur in this result on the theory there was no evidence from which the jury could reasonably find defendant guilty on either count.

By act of Congress, however, this one court should not have
granted a new trial if all the evidence in the record, however,
as above stated, no verdict could ever cause one to believe the
defendant alone the overwhelming weight of any evidence upon
plaintiff was guilty of contributory negligence. The contention the
jury trends instructions - many more, we think, that would be
given in a case of this kind - and upon a consideration of them
we think the jury, in view of the fact that the issues were simple
and easily understood, was not misled.

The judgment of the superior court of Cook County is
reversed and the cause remanded with directions to enter judgment
on the verdict as rendered.

REVERSED AND REMANDED WITH DIRECTIONS.

Heaney, P. J., concurs.

McCurdy, J.: I concur in this result on the theory there was no
evidence from which the jury could reasonably find
defendant guilty of gross negligence.

40473

NORA M. FROEHLER,

Plaintiff - Appellant,

v.

NORTH AMERICAN LIFE INSURANCE COMPANY OF CHICAGO, a corporation,

Defendant - Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

26A

300 I.A. 611

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal brought by defendant, the Circuit Court having entered a judgment for plaintiff. At that time this court reversed the judgment and remanded the cause.

The following pertinent facts were presented on both trials:

On April 1, 1932, Thomas D. Froehler, husband of the plaintiff, received a life insurance policy upon his application for $10,000.00 from the North American Life Insurance Company of Chicago, and the company issued its receipt for $201.60, acknowledging payment of the first annual premium.

The second annual premium was due on April 1, 1933, and was not then paid, nor was it paid within the 30-day grace period. Consequently the policy lapsed on May 1, 1933.

It further appears that the policy which was issued contained the following provision:

> "Reinstatement - This policy may be reinstated after default in payment of any premium upon evidence of insurability satisfactory to the company, subject to the payment of past due premiums, with interest at 6 per cent per annum thereon. * * *"

It further appears that on May 5, 1933, Mr. Forehler executed his application for reinstatement and forwarded the same by mail to the company, together with his check for $53.43 in payment of the first quarterly premium for the second year of the policy. There is

ROLA M. FRANKLIN,

Plaintiff - Appellee,

vs.

NORTH AMERICAN LIFE INSURANCE COMPANY OF CHICAGO, a corporation,

Defendant - Appellant.

NORTH DAKOTA.

Appeal from District Court, S. Williams County.

HON. THEODORE LEWIS, Judge.

OPINION OF THE COURT.

This case was before this court on a former appeal wherein by defendant, the circuit court having entered a judgment for plaintiff. At that time this court reversed the judgment and remanded the cause.

The following pertinent facts were presented on both trials:

On April 1, 1921, Thomas S. Franklin, husband of the plaintiff, received a life insurance policy upon his application for $10,000.00 from the North American Life Insurance Company of Chicago, and the company issued the policy for $201.00, acknowledging payment of the first annual premium.

The second annual premium was due on April 1, 1922, and was not then paid, nor was it paid within the 30-day grace period. Consequently the policy lapsed on May 1, 1922.

It further appears that the policy which was issued contained the following provision:

"Reinstatement - This policy may be reinstated after default in payment of any premium upon evidence of insurability satisfactory to the company, subject to the payment of back premiums, with interest at 6 per cent per annum thereon. " " "

It further appears that on May 3, 1927, Mr. Franklin executed his application for reinstatement and forwarded the same by mail to the company, together with his check for $24.47 in payment of the first quarterly premium for the second year of the policy. There is

some dispute as to whether the receipt was dated May 4, 1933 or May 5, 1933. In the application accompanying the check Mr. Froehler answered in the affirmative the question as to whether he was in good health.

The receipt which was given by the company for money that was paid at the time of the reinstatement, contains the following provision:

> "It is understood that this payment is in no way binding upon the said Company except that said Company agrees to return the amount received in case the Company declines to reinstate said policy.
>
> "Note: If notice of approval is not received within thirty days, the amount tendered will be refunded by this Company on request."

It is also part of the facts that on May 19, 1933, two weeks after the date of application for reinstatement, the company mailed a letter to Mr. Froehler notifying him that said application was declined because the evidence of insurability was not satisfactory, and enclosed its check for $53.43, in refund of the amount forwarded with said application.

In the original application Mr. Froehler answered in the negative every question as to the existence of any physical ailment, including those as to the existence of any impairment of vision or hearing or diseases of the eye or ear.

It also appears as a part of the facts that Mr. Froehler consulted Dr. Loyal Davis at his home one evening about a week or two before he went to the hospital; that at that time he complained to Dr. Davis of headaches which were associated with vomiting on one or two occasions, difficulty of vision, and he stated he had suffered a progressive loss of vision for the past two years and that his left eye was then useless.

On May 17, 1933, Mr. Froehler went to the Passavant Hospital for observation for brain tumor where he was operated upon and died.

some dispute as to whether the receipt was dated May 4, 1921 or May 5, 1921. In the application accompanying the check, Crawford answered in the affirmative the question as to whether he was in good health.

The amount which was given by the company for money that was paid at the time of the reinstatement, contains the following provision:

"It is understood that any payment is to be for months upon the said company except that said company agrees to return the amount received in case the company decline to reinstate said policy.

"Note: If medical or surgical is not required within sixty days, the amount tendered will be refunded by this Company on request."

It is also part of the facts that on May 19, 1921, two weeks after the date of application for reinstatement, the company mailed a letter to Mr. Froehlar notifying him that his application was declined because the evidence of insurability was not satisfactory, and enclosed its check for $23.21, in refund of the amount forwarded with his application.

In the original application Mr. Froehlar answered in the negative every question in the existence of any physical ailment, including there or in the existence of any impairment or claim of hearing or diseases of the eye or ear.

It also appears as a part of the facts that Mr. Froehlar consulted Dr. Loyal Davis at his home one evening about a week or two before he went to the hospital; that at that time he complained to Dr. Davis of headaches which were associated with vomiting on one or two occasions, difficulty of vision, and he stated he had suffered a progressive loss of vision for the past two years and that his left eye was than useless.

On May 17, 1921, Mr. Froehlar went to the Presbyterian Hospital for observation for brain tumor where he was admitted upon and died.

The opinion filed in this case when it was here on appeal the first time, is reported in the 289 Ill. App. 402.

On the second trial before a judge and jury, the jury again returned a verdict in favor of plaintiff for the sum of $12,479.29. Upon a motion for judgment notwithstanding the verdict, the court set aside the verdict of the jury and entered judgment for defendant, from which judgment plaintiff brings this appeal.

No question is raised upon the pleadings.

Plaintiff claims that under the decision heretofore rendered in this cause by this court, wherein the judgment was reversed and the cause remanded, it was the duty of the trial court not to disturb the verdict of the jury which was rendered after submission of the case to the jury under instructions as to the law, as outlined in this court's former opinion.

Defendant's theory of the case is that under the evidence submitted and the law as announced in this court's former opinion, it was entitled as a matter of law to a directed verdict.

Although this case has been argued at length on the theory that new evidence has been adduced which would substantially change the facts as found in the former case, we do not find any new evidence of such controlling character as would cause us to make a different decision at this time than ~~xxxxxxxx~~ on the former appeal. It still remains true that the original policy of insurance had expired; that the provisions of said policy entitled the plaintiff to make an application for reinstatement upon the evidence of insurability satisfactory to the company, subject to the payment of past due premiums and its reinstatement of him then would restore all his rights under the original contract of insurance and same would be in full force and effect. The application for reinstatement of the policy was made out on the blank furnished by the insurance company. The receipt which was attached to the application for reinstatement, reads in part as follows:

3

The opinion filed in this case when it was here on appeal the first time, is reported in 98 Ill. App. 504.

On the second trial before a jury and jury trial returned a verdict in favor of plaintiff for the sum of $15,000.00. Upon a motion for judgment notwithstanding the verdict, the court set aside the verdict of the jury and entered judgment for defendant, from which judgment plaintiff brings this appeal.

So question is raised upon the pleadings.

Plaintiff claims that under the decision heretofore in this cause by this court, wherein the judgment was reversed and the cause remanded, it was the duty of the trial court not to disturb the verdict of the jury which was rendered after modification of the case to the jury under instructions as to the law, as outlined in this court's former opinion.

Defendant's theory of the case is that under the evidence submitted and the law as announced in this court's former opinion, it was entitled to a peremptory of its motion.

Although this court has been cited at length on the theory that new evidence has been adduced which would substantially change the facts as found in the former case, we do not find any new evidence of such controlling character as would cause us to make a different decision at this time than ~~xxxxxxxx~~ in the former appeal. It still remains true that the original policy of insurance did contain; that the provisions of said policy entitled the plaintiff to make an application for reinstatement upon the evidence of insurability satisfactory to the company, subject to the payment of back due premiums and the reinstatement of his then unpaid premiums, all his rights under the original contract of insurance and issue would be in full force and effect. The application for reinstatement of the policy was made and as the ~~xxxxx~~ finding by the insurance company. The reason which was assigned to the application for reinstatement, reads in part as follows:

"It is understood that this payment is in no way binding upon said Company, except that said Company agrees to return the amount received in case the Company declines to reinstate said policy. * * *

"Note: If notice of approval is not received within 30 days the amount tendered will be refunded by this Company on request."

Application for reinstatement was made on May 4, 1933, and the refusal on the part of the company to reinstate the plaintiff's contract of insurance was dated May 19, 1933. During this interim it developed that knowledge had come to the defendant company that the plaintiff was suffering from tumor of the brain which had existed for some time and on the evening of May 19, 1933, he died as a result of the operation which was performed that day. The premiums were returned by the insurance company and a letter of refusal of acceptance. In answer to this the plaintiff claims that the insurance company took too much time in passing upon the question of reinstatement. No time limit was provided for in the contract and what should be considered as a reasonable length of time is not set forth either in the contract of insurance or the reinstatement, nor does counsel suggest just what time should have been taken for such consideration.

The facts presented for our consideration disclose that plaintiff's intestate should not have been reinstated because of his physical condition and we think the defendant insurance company was justified in taking sufficient time to discover the real facts. That being true, there was no contract of insurance between plaintiff's intestate and the defendant insurance company at the time of his death.

In the former opinion filed by this court, entitled, Froehler v. North American Life Ins. Co., 289 Ill. App. 402, the court having discussed the matter with relation to reinstatement, said:

"This conclusion is supported by the facts referred to in the opinion, and when we consider this progressive loss of sight, there is only one decision we are obliged to make upon the record before this court, and that is that the applicant's

"It is contended that this payment is in no way binding upon said Company, except that said Company agrees to return the amount received in case the Company declines to reinstate said policy. * * *

"Note: If notice of approval is not received within 20 days the amount tendered will be refunded by this Company on request."

Application for reinstatement was made on July 7, 1937, and the refusal on the part of the company to reinstate the plaintiff's contract of insurance was dated July 12, 1937. During this interim it developed that Wheelwright had gone to the defendant company that the plaintiff was suffering from tumor of the brain which had relapsed for some time and on the evening of July 14, 1937, he died as a result of the operation which was performed that day. The premium was returned by the insurance company and a letter of refusal of acceptance. In answer to this the plaintiff claims that the insurance company took too much time in passing upon the question of reinstatement. No time limit was provided for in the contract and that should be considered as a reasonable length of time is not set forth either in the contract of insurance or the reinstatement, nor does counsel suggest just what time should have been taken for such consideration.

The trial judge found for our constitutional grounds that plaintiff's testate should not have been reinstated because of his physical condition and at that the defendant insurance company was justified in taking sufficient time to discover the real facts. That being true, there was no contract of insurance between plaintiff's testate and the defendant insurance company at the time of his death.

In the former opinion filed in this court, entitled,

Prosser v. North American Life Ins. Co., 3 Ill. App. 407, the court having discussed the matter with relation to reinstatement, said:

"This conclusion is supported by the facts referred to in the opinion, and when we consider this respectively long of right, there is only one decision of our affairs is made upon the record before this court, and that is that the company's

condition was such that he was not an insurable risk at the time he made application for reinstatement."

There is much discussion as to what, under the law, the trial court should do relative to the various motions made and also as to the rulings to be observed on motions to direct a verdict at the conclusion of plaintiff's case or at the conclusion of the entire evidence or on a motion for a judgment non obstante veredicto. We do not think it is necessary for us to discuss these questions at this time. There have been two trials and the plaintiff had ample opportunity to demonstrate that she was entitled to recover, if she had, but we now conclude from a review of the evidence that no recovery should be had. We think the trial court could well have entered a directed verdict at the conclusion of plaintiff's evidence, but this was accomplished substantially by entering the judgment non obstante veredicto.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

conditions are such that we find ourselves unable to say as the time be made qualification for relinquishment.'

There is much discussion as to what, under the law, the trial court should do relative to the petition motions made and also as to the failure to be directed on motions to direct a verdict at the conclusion of plaintiff's case or at the conclusion of the entire evidence or on a motion for a judgment non obstante veredicto. We do not think it is necessary for us to discuss these questions at this time. There was ample time in which the plaintiff had ample opportunity to demonstrate that she was entitled to recover, if she had, but we can conclude from a review of the evidence that no recovery should be had. We think the trial court should have entered a directed verdict at the conclusion of plaintiff's evidence, but this was accomplished substantially by sustaining the judgment non obstante veredicto.

For the reasons herein given the judgment of the Juvenile Court is affirmed.

JUDGMENT AFFIRMED.

BERRY, ADC SUTTE, JJ., DISSENT.

40365

PEOPLE OF THE STATE OF ILLINOIS, ex rel. OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

v.

HOME BANK AND TRUST COMPANY, a corporation,

ELSIE MAMMEL,

Petitioner - Appellant,

v.

CASIMIR E. MIDOWICZ, as Receiver of Home Bank and Trust Company,

Respondent - Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

2 TA

300 I.A. 611[3]

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 31, 1926, a trust agreement, known as Trust No. 863, was executed between the Home Bank and Trust Company and Julia G. Vidvard, under which the bank was to take title, as trustee, to certain real estate in Lake County, Illinois. The real estate was then owned by Julia G. Vidvard, and the agreement contemplated that the real estate would be sold as subdivision property. Julia G. Vidvard was the sole beneficiary of the trust. On April 8, 1926, Julia G. Vidvard conveyed the real estate to the bank as trustee under Trust No. 863. On August 28, 1927, Elsie Mammel purchased through the Vidvard Realty Company the property known as Lot 140 in Lotuswoods Subdivision, Lake County, Illinois, for the price of $1,400.00, made a down payment of $50.00 and agreed to pay $230.00 within ten days, at which time a contract of sale was to be executed. The lot was part of the real estate included in the trust agreement. The trust agreement provides that the trustee shall be paid $840.00 for accepting the trust and reasonable compensation thereafter. It paid to itself from the assets of the trust $840.00 as its acceptance fee and $252.11 for other services rendered by it as trustee. A contract for a deed for the lot, dated August 28, 1927, was signed by Elsie Mammel, and

is between herself and the bank, as trustee. A clause thereof reads as follows: "This Contract is made by the undersigned not individually but as trustee under a certain trust agreement known as Trust No. 863. Said trust agreement is hereby made a part hereof and this contract is enforceable only against and any claims hereon are payable only out of the trust property held thereunder. Any and all personal liability of the trustee being hereby expressly waived by the parties hereto. (Signed) Home Bank and Trust Company, By John J. Blazon, Asst. Secretary". A provision of the trust agreement between the settlor and the bank was that a purchaser was not obliged to see to the application of the purchase money, and that a purchaser was not privileged to inquire into any of the terms of the trust agreement. On June 14, 1932, the bank was closed by the Auditor of Public Accounts and a receiver was appointed, and on July 22, 1932, the Circuit Court of Cook County entered an order approving and confirming such appointment. On March 7, 1933, Elsie Mammel filed her petition in the liquidation proceedings, wherein she set out what has above been recited, and in addition states that she paid the purchase price of $1,400.00 called for by the agreement and the further sum of $148.85, or an aggregate sum of $1,548.85, being the full and complete payment in accordance with the agreement; that on completing the payments, she requested and demanded from the bank, as trustee, the conveyance to her of title to the land described in the contract; that the bank at all times failed and refused to convey the same to her as contemplated in the contract; that from time to time she requested and demanded that the bank return to her the amounts of money so paid by her; that the bank failed and refused to comply with her request, except to offer her a compromise of $1,200.00 which offer was made prior to the institution of the liquidation proceedings, and she prayed that an order be entered directing the receiver to

is between herself and the Duke, as follows. A clerk received words as follows: "This business is made up in underhand not initially but as Duke's agent a certain that expenses should be from No. 085. Said that agreement is hereby made a part hereof and this contract is exclusive only co-later and any claims between the parties only not of the trust property with therewith. Any and all personal liability of the trustee being hereby expressly waived by the certain notice. (Signed) John Jones and Jones Company, by John J. Clarke, Asst. Secretary". A statement of the trust agreement between the parties was for each one that a guarantee was not called to see to the availability of the property money, and that a guarantee was not available to income into any of the funds of the trust agreement. In June 11, 1920, the bank was closed by the Auditor of Public Accounts and a receiver was appointed, and on July 27, 1920, the Circuit Court of Cook County ordered to make accounting and continuing such appointment. On March 7, 1921, this Court held for petition in the liquidation proceedings, wherein the net sum that has been paid, and in addition stated that the said the commission claim of $1,400.00 owing for by the accountant and the Duke was at $148.85, or an aggregate sum of $1,548.85, being the full and complete payment in accordance with the agreement; that a no consulting the department, who requested and demanded from the bank, in transfer, the conveyance to her of title to the land involved in the controversy; that the bank at all times filed and refused to convey the same to her as contemplated in the contract; that from time to time she requested and demanded that the bank return to her the amount of money so paid by her; that the bank failed and refused to comply with her request, except to offer her a mortgage of $1,500.00 which offer the made prior to the liquidation of the liquidation proceedings, and she prayed that an order be entered directing the receiver to

answer her petition and directing the receiver to pay to her the sum of $1,548.85, together with interest thereon from the date of payment "as a prior and preferred claim upon the assets of said Home Bank and Trust Company, and for such other relief in the premises as to the court shall seem meet". In its answer, the receiver stated that the $50.00 payment of August 28, 1927, was made direct to the Vidvard Realty Company, and that the $230.00 payment of September 5, 1927, was also made in the same way, and admits receipt of all other payments. It asserted that the contract on which petitioner based her rights showed on its face that it was not enforceable against the bank in its individual capacity, or against the receiver or against any assets in the hands of the receiver. The cause was referred to a Master in Chancery, who found that petitioner had paid the entire sums plus interest, with the exception of $50.00, to the bank; that the contract provided that upon payment of one half of the purchase price, the trustee would execute a deed, the balance to be evidenced by a note secured by a trust deed; that petitioner made the payments; that upon completion of fifty percent of the payments, she made demand upon the bank for delivery of the deed; that the bank, as trustee, made excuses to her for failure to deliver the deed and suggested that she continue to make monthly payments; that pursuant to that suggestion, she made further payments on account of principal and interest so that the aggregate payments made by her amounted to the sum of $1,557.83. The Master found that the contract established the relation of vendor and vendee; that she was placed upon notice by the terms of the contract; that she was dealing with the bank not personally but in its capacity as trustee under Trust No. 863, with the liability of the trustee limited to the trust property conveyed under the trust agreement; that it was not intended that the bank

would hold the moneys paid either as escrowee, stakeholder or in any other capacity; that petitioner had no claim in equity against the assets of the bank or the securities deposited with the auditor and recommended that her petition be dismissed for want of equity. She filed objections, one of which was that the Master erred in not finding that Julia Vidvard was indebted to the bank in the sum of $12,000.00, and that in order to secure the indebtedness she transferred and assigned to the bank all her right and interest in and to the property held by the bank, as trustee, under Trust No. 863, and the proceeds and avails thereof, so that the bank was to all intents and purposes the sole beneficiary under said trust. Another objection was that the bank, as trustee, under Trust No. 863, had a credit in said trust of $1,184.05, which represents an asset of the trust which accrued by reason of the payments made by petitioner to the bank, and that petitioner was entitled to recover the sum of $1,184.05 for application against the total amount of her claim and to recover the remainder of her claim from the securities deposited with the auditor. The Master amended his report by adding "That the said Julia G. Vidvard assigned her beneficial interest in and to said Trust No. 863 to the Home Bank and Trust Company, a corporation, as security for the payment of an indebtedness in the approximate sum of $12,000.00". In all other respects, the objections were overruled. The remaining objections were permitted to stand as exceptions. The receiver did not file any objections or exceptions. The exceptions of petitioner were overruled and a decree entered dismissing the petition for want of equity, to reverse which this appeal is prosecuted.

In his brief in this court, the receiver argues that the findings of the Master that the payment of $230.00 was made to the trustee, and that Julia G. Vidvard assigned her beneficial interest in Trust No. 863 to the bank, are not supported by the record. No objections as to these findings were filed with the Master and no exceptions were filed with the Chancellor.

would hold the money with either as security, stockholder or in any other capacity; that petitioner had no claim in equity against the assets of the bank or the securities deposited with the auditor and recommended that her petition be dismissed for want of equity.

The filed objections, one of which was that the master erred in not finding that Julia Vivaret was interested as the bank in the sum of $12,000.00, and that in order to secure the indebtedness the transferred and assigned to the bank all her right and interest in and to the property held by the bank, as trustee, under Trust No. 885, and the proceeds and avails thereof, so that the bank was to all intents and purposes the sole beneficiary under said trust. Another objection was that the bank, as trustee, under Trust No. 885, had a credit in said trust of $1,184.02, which represents an asset of the trust which accrued by reason of the payments made by petitioner to the bank, and that petitioner was entitled to recover the sum of $1,184.02 for application against the total amount of her claim and to recover the remainder of her claim from the securities deposited with the auditor. The master amended his report by stating "that the said Julia A. Vivaret assigned her beneficial interest in and to said Trust No. 885 to the Close Bank and Trust Company, a corporation, as security for the payment of an indebtedness in the approximate sum of $12,000.00". In all other respects, the objections were overruled. The remaining objections were presented to attack the exceptions. The receiver did not file any objections or exceptions. The exceptions of petitioner were overruled and a decree entered dismissing the petition for want of equity, to review which this appeal is prosecuted.

In the brief in this court, the receiver argues that the finding of the master that the payment of $300.00 was made to the trustee, and that Julia A. Vivaret assigned her beneficial interest in Trust No. 885 to the bank, is not supported by the record. No objections as to these findings were filed with the Master and no exceptions were filed with the Master and no

> " * * * it is well settled that where matters of fact are referred to a master for his determination, it is the duty of the parties, when notified, as was done here, to appear before him and there contest the matter, and if his findings are not, in their judgment, supported by the evidence, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report if it should happen to be wrong; and if in such case, after hearing the objections, the master declines to modify or change his report, it is the duty of the objecting parties, after it has been in court, to appear there and file exceptions to it; and when this course has not been pursued, and no sufficient reason is assigned for not doing so, as was the case here, the report of the master when approved by the court, will be deemed in this court conclusive upon the questions covered by it." (Jewell v. Rock River Paper Co., 101 Ill. 57, 68-69. See also Marble v. Thomas, 178 Ill. 540; Hurd v. Goodrich, 59 Ill. 450; Udstuen v. Illk, 291 Ill. 443, 448; Johnson v. Voudrie, 233 Ill. Appl 572, 576; Dreger v. Boyer, 297 Ill. App. 581).

Therefore, the receiver cannot be heard to complain as to any findings of the Master.

The first proposition advanced by petitioner is that the bank, as trustee, under Trust No. 863, having failed to convey the parcel of land in question to petitioner as it contracted to do upon payment by petitioner of the consideration therefor, the petitioner is entitled to recover the amount of the consideration so paid by her out of the assets of Trust No. 863. The receiver repels the contention by saying that the petitioner is in this court for the first time asserting a claim to recover out of the assets of Trust No. 863, such claim not having been made in the Circuit Court by pleadings or proof. If the claim was not made in the court below, it cannot be made here. Petitioner's intervening petition set up the ultimate facts on which the claim was founded and concluded with a prayer for specific and general relief. One of the objections to the Master's report was that he overlooked finding that the bank, as trustee under Trust No. 863, had a credit in the trust in the approximate sum of $1,103.00. Because at the time the objections were prepared the transcript of the evidence was before the Master, the amount stated as a credit in the trust was $1,103.00 whnh it should have been $1,184.05. The error was later corrected. There was a further objection that the Master erred in

* * * It is well settled that where matters of fact are referred to a master for his determination, it is his duty of the parties, when notified, to see that he, to master before him and there contest the matter, and if his findings are not in their judgment, supported by the evidence, it is their duty to interpose their objections, or to attempt the master at opportunity to modify his report if it should happen to be wrong; and if in such case, after hearing the objections, the master declines to modify or change his report, it is the duty of the objecting parties, after it has been in court, to argue there and file exceptions to it; and when this course has not been pursued, and no sufficient reason is assigned for not doing so, we are the court here, the report of the master when approved by the court, will be treated in this court conclusive upon the questions covered by it." (Ferrell) v. Lake Shore Ry Co., 101 Ill. 67, Sheets. See also Bartle v. Chicago, 116 Ill. 240; Ward v. Hopkins, 85 Ill. 420; Johnson v. Hill, 98 Ill. 443, 448; Jackson v. Lawler, 107 Ill. 364, 372, 374; Dreher v. Hyatt, 107 Ill. 167, 181).

Therefore, the referee cannot be held to mislead as to any findings of the master.

The first contention advanced by petitioner is that the bank, as trustee, under trust No. 873, having failed to convey the parcel of land in question to petitioner as it undertook to do upon payment by petitioner of the consideration therefor, the petitioner is entitled to recover the amount of the consideration so paid by her out of the assets of Trust No. 873. The referee meets the contention by saying that the petitioner is in this court for the first time asserting a claim to recover out of the assets of Trust No. 873, such claim not having been made in the circuit court by pleadings or proof. If the claim was not made in the court below, it needed to be made here. Petitioner's intervening petition set up the claims upon which the claim was founded and concluded with a prayer for specific and general relief. One of the objections to the master's report was that he overlooked finding that the bank, as trustee under Trust No. 873, had a credit in the trust in the aforementioned sum of $1,102.00. Counsel at the time the objections were presented the transcript of the evidence was before the master, the amount stated as a credit in the trust was $1,102.00 when it should have been $1,124.00. The error was later corrected. There was a further objection that the master erred in

not allowing the claim as a preferred claim and directing payment first from the assets of Trust No. 863, and second from the securities deposited by the bank with the auditor. The notice of appeal prays that an order be entered directing the receiver to pay petitioner the sum of $1,557.83, together with interest thereon, from the fund of $1,184.05 appearing as a credit to Trust No. 863, so far as such fund is available, and the balance from the proceeds of the securities deposited with the auditor.

We are of the opinion that the claim to recover out of the assets of Trust No. 863 was properly asserted in the trial court and, therefore, may be asserted here. Despite the argument of the receiver that the contract for the deed was between the Vidvard Realty Company and Elsie Mammel, we find that the contract was between the Home Bank and Trust Company, as trustee, and Elsie Mammel. Under the trust indenture the beneficiary was Julia G. Vidvard. As the payments were made to the trustee, it was the latter's duty, after deducting its charges, to remit the balance to Julia G. Vidvard. In his supplemental report the Master found that the beneficial interest of Julia G. Vidvard was assigned to the bank in its individual capacity. The bank has on hand credited to Trust No. 863, the sum of $1,184.05. The only person, apparently, who could claim any interest therein is Julia G. Vidvard. According to the record, she assigned her interest to the bank. The Master found that the petitioner, having made payments on account of principal to the extent of one half of the purchase price, together with accruing interest from time to time, made demand on the bank for the delivery of the deed; that the bank, as trustee, made excuses to her for failure to deliver the deed and suggested that she continue to make monthly payments, and that pursuant to the suggestion she made further payments on account of principal and interest so that the aggregate of payments made amounted to the sum of $1,557.83. His findings and recommendations overlooked

not allowing the claim as a preferred claim and directing payment first from the assets of trust co. 267, and second from the securities deposited by the bank with the auditor. The action of school board had no power in advance directing the receiver to pay preferred the sum of $1,547.67, together with interest thereon, from the fund of $1,124.75 remaining as a credit to trust co. 267, so far as such fund is available, and the balance from the proceeds of the securities deposited with the auditor.

We are of the opinion that the claim to recover out of the assets of trust co. 267 was properly asserted in the trial court and, therefore, may be asserted here. Should the judgment of the receiver that the deficiency for the deed was between the Tidyard Realty Company and Julia Jensen, or that the contract was between the Home Bank and Trust Company, as trustee, and Clark Tassell, under the trust indenture the depository was Julia G. Tidyard. As the payments were made to the trustee, it was the latter's duty, after deducting its charges, to credit the balance to Julia G. Tidyard. In his supplemental report the master found that the residuary interest of Julia G. Tidyard was assigned to the bank in its individual capacity. The trust has on hand credited to trust co. 267, the sum of $1,124.75. The only person, apparently, who could claim any interest therein is Julia G. Tidyard. According to the record, she assigned her interest to the bank. The master found that the assignment, coupled made payments on account of principal to the extent of the unit of the purchase price, together with accruing interest from time to time, made demand on the bank for the delivery of the deed; that the bank, as trustee, made expenses to the for failure to deliver the deed and suggested that she continue to make monthly payments, and that payment to the superfluous she made further payments on account of principal and interest so that the payments of principal made amounted to the sum of $1,547.67. His findings and recommendations practically

the sum of $1,184.05 to the credit of Trust No. 863. The basis of his recommendation was that the liability of the bank as trustee was limited to the trust property conveyed, and that she had no claim against the assets of the bank or the securities deposited with the auditor. After the bank was closed, the receiver tendered a deed. We are satisfied, however, that at that time, in view of the failure of the bank, as trustee, to deliver a deed, she had a right to insist on the return from the receiver, to the extent of assets in the trust, of the amounts she had paid. As the matter stands, it would be a great injustice to allow the receiver to retain $1,184.05.

Finally, Julia G. Vidvard maintains that she is a creditor of the bank as a result of the acceptance by it of an express trust, and that as such creditor she is entitled to have her claim paid out of the securities deposited. The duties which the bank as trustee undertook are circumscribed by the trust instrument and the agreement for the deed. The latter contains the clause that "this contract is enforceable only against and any claims hereon are payable only out of the trust property held thereunder. Any and all personal liability of the trustee being hereby expressly waived by the parties hereto". We are of the opinion that in the absence of bad faith, dishonesty or misconduct, the claim of Elsie Mammel is enforceable only against the trust property. The Master was right in finding that her claim could not be allowed as against the securities deposited with the auditor. By the express language of her contract she was limited to the trust property insofar as any claim against the trustee was concerned. In his brief, the receiver states that there is a cash balance on hand to the credit of Trust No. 863 of $1,184.05. This amount should be paid to the petitioner.

the sum of $1,124.00 to the credit of trust No. 382. The whole of his recommendation was that the liability of the bank as trustee was limited to the trust property conveyed, and that she had no claim against the assets of the bank or the partnership associated with the auditor. After the bank was closed, the receiver tendered a deed. He was satisfied, however, that at that time, in view of the failure of the bank, as trustee, to initiate a tort, and had a right to insist on the return from the receiver, to the extent of assets in the trust, of the amounts she had paid. In the matter stands, it would be a great injustice to allow the receiver to retain $1,124.00.

Finally, Julia G. Vickers maintains that she is a creditor of the bank as a result of her assistance by it of an express trust, and that as such creditor she is entitled to share pro rata out of the securities deposited. The notes which the bank as trustee standard are alternatives by the trust instrument and the contents for the dead. The latter contains the clause that "this mortgage is enforceable only against and by claims arising out of the trust property held thereunder. Any and all personal liability of the trustee being hereby expressly waived by the mortgagee". As are of the opinion that in the absence of bad faith, dishonesty or misconduct, the claim of Julia Vickers is enforceable only against the trust property. The lender has right to finding that her claim could not be allowed as against the securities deposited with the auditor. By the express language of her contract she was limited to the trust property insofar as her claim against the trustee was concerned. In his brief, the receiver states that there is a net balance on hand to the credit of trust No. 382 of $1,124.00. This amount should be paid to the petitioner.

Because of the views expressed, the decree of the Circuit Court of Cook County is reversed and the cause remanded with directions to enter a decree that the receiver pay to claimant Elsie Mammel the sum of $1,184.05 credited to Trust No. 863, and to disallow the remainder of her claim.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

40432

MARIE MIZWINSKI, individually and as administratrix of the estate of John Biernat, deceased, et al., Appellee, v. FRANK BIERNAT, MARY BIERNAT, et al., On Appeal of Mary Biernat, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

300 I.A. 611[4]

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On October 24, 1935, John Biernat, the owner of the real estate commonly known as 1901 West 21st Place, Chicago, died intestate leaving him surviving his widow Mary Biernat and seven children, one of whom was Marie Mizwinski, a daughter. On February 3, 1937, the widow duly quitclaimed to Marie Mizwinski her undivided one third interest in and to said real estate. On February 26, 1937, Marie Mizwinski was appointed administratrix of the estate of her father. Subsequently, Marie Mizwinski, individually and as administratrix of her father's estate filed a petition in the Circuit Court of Cook County to partition the real estate. On August 4, 1937, a decree was entered which found inter alia that Mary Biernat, the widow, quitclaimed her interest in the real estate to Marie Mizwinski; that the deed was duly executed, acknowledged, delivered and recorded; that Marie Mizwinski, as an heir and by virtue of a quitclaim deed by Mary Biernat, possessed a 9/21sts interest; that Michael Biernat, Edward Biernat, Frank Biernat, Joseph Biernat, Anna Koranchan and Charlotte Biernat respectively, and each of them, possessed a 2/21sts interest; that the premises were subject to a first mortgage to the Piast Federal Building and Loan Association in the sum of $803.07; that the property should be partitioned; and appointed three commissioners to make partition. The commissioners reported that

the real estate could not be partitioned and the court ordered the property to be sold. On October 7, 1937, Mary Biernat was given leave to file an intervening petition. The intervening petition, filed on October 18, 1937, sought to set aside the quitclaim deed given to Marie Mizwinski on the ground that the deed was given in consideration of the promise of Marie Mizwinski to take care of petitioner for the rest of her natural life, and that Marie Mizwinski broke her promise, and that therefore, the conveyance was null and void because of failure of consideration. Marie Mizwinski answered the petition. On December 18, 1937, while the intervening petition was pending and undetermined, the property was sold at a Master's sale for $1,700.00, and the cause was referred to the Master to make allowance for Master's fees, solicitor's fees, costs etc., and to state an account among the parties. On June 22, 1938, the Master filed his report and recommended that the intervening petition of Mary Biernat be dismissed for want of equity, insofar as her contention that the quitclaim deed should be declared invalid, was concerned. The Master also found that the appraisement of the widow's award was duly made in the Probate Court in the sum of $700.00, which appraisement was approved by the court; that on May 4, 1938, an order was entered in the Probate Court, stating the amount of attorney's fees, administratrix's fees and costs of administration. The Master further reported that the property was sold for $1,700.00; that he paid $685.65 on the first mortgage, leaving $1,014.35 for distribution; that he proposed to distribute the balance of $1,014.35 as follows: To the Master in Chancery $283.80; to plaintiff for amounts paid for court costs, sheriff's fees, abstract charges and other incidental expenses including $350.00 for attorney's fees, $656.10; charges for commissioners at sale, $30.00, making a total of $969.90; that there remained a balance of$44.45, which the Master recommended be paid to

the land which could not be satisfied -as the court ordered the property to be sold. On October 7, 1877, Mary Barnett was given leave to file an intervening petition. The intervening petition, filed on October 12, 1877, sought to set aside the judgment and given to Anna Bierhaus on the ground that the deed was given in consideration of the promise of Anna Bierhaus to take care of petitioner for the rest of her natural life, and that Anna Bierhaus has failed, and still refuses, to perform the said and void because of failure of consideration. Anna Bierhaus demurred the petition. On December 12, 1877, while the intervening petition was pending and undetermined, the property was sold at a Master's sale for $1,700.00, and the same was returned to the Master to make affidavit for Master's fees, solicitor's fees, costs etc., and to state an account among the parties. On June 7, 1878, the Master filed his report and stipulations with the intervening petition of Mary Barnett be dismissed for want of equity, whether or not defendant Anna Bierhaus should be declared invalid, was disposed. The Master also found that the expenditures of the Master's sale was duly made to the Tribune Court in the sum of $[illegible], which expenditures were approved by the court; that on July 7, 1878, an order was entered in the Probate Court, stating the amount of Attorney's fees, administrator's fees and costs of administration. The Master further reported that the property was sold for $1,700.00; that he paid $[illegible].00 on the first mortgage, leaving $1,014.76 the distribution; that he presented to distribute the balance of $1,[illegible] as follows: To the Master in Chancery $[illegible]; to Dimitri for remains paid for court costs, Dwight's fees, Chicago Sentry and other incidental expenses including $[illegible].00 for Attorney's fees, $[illegible]; expense for commissioner at sale, $[illegible], making a total of $[illegible]; that there remained a balance of $[illegible], which the Master recommended be paid to

Marie Mizwinski, as administratrix of the estate of John Biernat, to be distributed by her in accordance with the directions of the Probate Court. The widow objected and asserted that the Master erred in not proposing to distribute the $1,700.00 as follows: (a) payment of $685.65 to Piast Federal Building and Loan Association; (b) payment of $225.20 to Marie Mizwinski as Administratrix of the estate of John Biernat, as per the order of the Probate Court entered on May 4, 1938; (c) Payment of $700.00 to Mary Biernat, for and as her widow's award allowed in the Probate Court; (d) The balance to be applied toward the necessary costs and expenses in this partition proceeding. She also maintained that the Master erred in not finding that the widow's award of $700.00 should be paid after the payment of the mortgage and the necessary costs of administration in the Probate Court, and that all other items are subject and subordinate to her right to collect her widow's award. The Master overruled the objections, which were allowed to stand as exceptions before the Chancellor, who overruled the exceptions and entered an order for distribution in accordance with the recommendation of the Master; from which order this appeal is prosecuted. The court also entered an order dismissing the intervening petition of Mary Biernat for want of equity. No exceptions were filed to the report of the Master finding that the quitclaim deed from the widow to Mary Mizwinski was valid and no appeal has been prosecuted from that part of the order.

The first point for us to determine is whether the quitclaim deed from the widow to Marie Mizwinski had the effect of withdrawing the real estate from the assets against which she could have recourse in collecting her widow's award. The Master found that the deed was valid and the court followed his recommendation and dismissed her petition for want of equity. It is contended, therefore, that at the time the real estate was sold the widow had no interest therein. The widow answers by saying that "one having a claim against an estate of

extra dividend, in satisfactory of the equity of just dividend, to be distributed by her in accordance with the directions of the Probate Court. The widow objected and contended that the court erred in not proceeding to distribute the $1,707.07 as follows: (a) payment of $587.50 to the first federal building and loan association; (b) payment of $587.50 to Orpie Blackwell in satisfaction of the estate of John Blackwell, in the order of the probate court entered on May 4, 1964; (c) payment of $587.50 to Mary Blackwell, the wife of her widow's sworn element in the probate court; (d) the widow to be granted toward the testatory needs her expenses in this partition proceeding. The also maintained that the trial court erred in not finding that the widow's award of $700.00 should be paid after the payment of the mortgage and the necessary costs of administration in the probate court, and that all other items are subject and unconditional to her right to retain her widow's award. The court overruled the objections, which were allowed to stand in exceptions before the chancellor, who overruled the exceptions and ordered the distribution in accordance with the recommendation of the master; from which order this appeal is prosecuted. The court also entered an order disallowing the intervening petition of Lucy Blackwell for want of equity. So exceptions were filed to the report of the master finding that the intestate had from the widow to Mary Blackwell was valid and no appeal has been prosecuted from that part of the order.

The first point for us to determine is whether the chancellor had from the widow to Mary Blackwell and the effect of disallowing the first petition from the lawful wedlock which she would have enjoyed in satisfaction her widow's award. The master found that the deed was valid and the court inferred his recommendation and dismissed her petition for want of equity. It is accordingly, therefore, that of the view the real estate was held the widow had no interest therein. The widow answers by saying that "she filing a claim against an estate of

which the real estate is in process of partition is not barred by a decree in the partition suit from afterwards asserting her claim against the real estate sold under such decree although she was a party to the partition suit merely as an heir, no question relating to her claim or to the administration of the estate being in issue. Sutton v. Read, 176 Ill. 89." We have examined the case of Sutton v. Read, supra., and are of the opinion that it is not applicable to the facts in the instant case. Here Mary Biernat quitclaimed her entire interest. It cannot be denied that a creditor of an estate has a right to release his or her claim insofar as certain real estate of the deceased is concerned. In the Sutton case the widow was a party but she had not conveyed her interest in the real estate. We are of the opinion that by the deed she conveyed all her interest, including her right to have recourse to the property to satisfy her widow's award. To hold otherwise would be to defeat the purpose of the deed. Her widow's award may nevertheless be enforced against other property, if any.

Finally, appellant urges that a widow's award is a claim prior to the payment of solicitors' fees in a partition proceeding. Section 75, Chapter 3, Ill. Rev. Stat. 1937, provides that a widow residing in this state, of a deceased husband whose estate is administered in this state, "shall, in all cases, in exclusion of all debts, claims, charges, legacies and bequests, except funeral expenses, be allowed as her sole and exclusive property forever, except as herein otherwise provided, the following, to-wit: First - the family pictures and the wearing apparel, jewels and ornaments of herself and her minor children. Second - Such sum of money as the appraisers may deem reasonable for the proper support of herself and his minor children for the period of one year after the death of the testator or intestate, in a manner suited to her condition in life, taking into account the condition of the estate of the testator or intestate."

which the pool table is the property of petitioner is not barred by a decree in the partition suit from thereafter asserting her claim against the pool table which would under some decree otherwise be a party to the partition suit should in fact, be awarded exclusive to her claim or at the commencement of the twelve living in fact. Dotson v. Dunn, 170 Ill. App. 4 (we have included the dissent of Justice Jones, which, and the opinion which is in our conclusion in the facts in the lower case. Some only slightly qualified our certain interest. It remains the basic case : question of to adopt not a right to trial on his or her claim brought to original jurisdiction of the chancery. In the Dotson case, the minor son and not sovereign her interest in the real estate. In the division suit by the dead one mentioned all her interest, including her right to have remained in the property is clearly her minor's interest. To hold otherwise would be to deprive the minors of the land. Her minor's award her mortgagees in relevant matter which concerning, if any.

Finally, appellant argues that a minor's owner is a child under in the interest of minorities' then in a partition proceeding. Section 75, Chapter 3, Ill. Rev. Stat. 1957, provides that a minor residing in this state, or a married married minor either in residence- stand in this state, "shall, in all cases, in evaluation of all homes, rights, objects, interests and benefits, under their control, consider, as allowed as her mate and exclusive property Tenant, ranger in person otherwise provided, the following, to-wit: first - the family pictures and the wearing apparel, jewels and ornaments of herself and her minor children. Second - that she at least in the circumstances may deem reasonable for the proper support of herself and her children children for the period of one year after the death of the husband or father, in a manner suited to her condition in life, taking into account the condition of the estate of the husband or father.

Section 71, Chapter 3, Ill. Rev. Stat. 1937, provides that "all demands against the estate of any testator or intestate shall be divided into classes in manner following, to-wit: First. Funeral expenses and necessary cost of administration. Second. The widow's award, if there be a widow; or children, if there are children and no widow. * * *" Appellee urges that "it is equitable that Mary Biernat and other parties be charged with the costs and expenses of the partition suit." The claim of Piast Federal Building and Loan Association was a prior lien to that of any other claim, and the premises had to be sold in order to pay such claim. The Circuit Court had jurisdiction to entertain the partition suit. The attorney's fees allowed were solely for services rendered in the original partition suit and not for services rendered in opposing defendant's intervening petition to set aside the quitclaim deed. No complaint is made that the fees are excessive. It was necessary to file a proceeding in the Probate Court to sell the real estate to pay debts, or to file the instant action in the Circuit Court. The only case cited on the point by either party is that of Little v. Williams, 7 Ill. App. 67, where at page 70, the court said:

> "The reasonable and necessary costs and expenses, occasioned by the proceedings to sell real estate, the administrator should have credit for, as said proceedings were at the instance, and for the benefit of appellant."

The law is that in a proceeding (in the Probate Court) to sell real estate to pay debts, the costs and attorneys' fees necessarily incurred therein are properly allowed prior to the widow's award. In logic and equity there is no good reason why the same rule is not applicable to a proceeding to partition in the Circuit Court. It would be unreasonable to hold that the choice of a forum determines whether or not the attorneys' fees have priority over the widow's award. We are satisfied that the court in following the recommendation

section 71, paragraph 3, Ill. Rev. Stat. 1957, provides that "All remedy against the tax of or the property or liability shall be filed into minutes in manner following, viz.: First. Thereof describe the delinquency such as distinguishes. Second. The amount, if there be a claim; or evidence, if there be evidence and no claim. " [illegible] argues that "it is evident that they argued and even neither be concerned with the merits the grounds of the petition suit." The right of first refusal notice and time limitation was a prior lien to that of any other claim, and the property had to be sold in order to get good claim. The trial court had jurisdiction to entertain the petition suit. The petitioner's then alleged were solely the matters contained in the original petition suit and the original judgment in counsel petitioner's interpleading petition to set aside the original sale. No complaint is made that the very sale necessary. If the necessary in file a proceeding in the federal court to sell the real taxing by the [illegible], or to file the instant action in the circuit court. The only ruling called on the point to direct error is that of [illegible]. Illinois 7 Ill. App. 27, where at page 30, the court said:

> "The reasonable and necessary costs incurred, necessitated by the proceedings to sell real estate, the outstanding taxes should have credit for, be also considering with at the instance, and for the benefit of plaintiff."

The law is that in a proceeding (as the instant) to sell real estate to pay taxes, the costs and attorneys' fees necessarily incurred therein are properly allowed prior to the claimant's lien. In Illinois and county there is no just reason why the same rule is not applicable in a proceeding to partition in the circuit court. It would be commendable to hold that the claim of a lien (whether certain or not) the attorneys' fees have priority over the claimant's costs. In the circumstances that the court in following the recommendation

of the Master as to the distribution of the funds, acted in accordance with the law.

Appellant points out that there are no assets in the estate other than the real estate. That fact cannot change the law applicable to the situation. The premises were first sold for $1,800.00. The widow objected, stating that the price was inadequate, and another sale was ordered. At the time set for the second sale, no bid was made. The property was advertised for sale a third time. Plaintiff Marie Mizwinski bid $1,700.00. The widow made no bid. There is no complaint that the property sold at too low a price.

For the reasons stated, the order of the Circuit Court of Cook County is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

40630

RACHEL MAYER, et al.,

Appellees,

v.

METROPOLIS THEATRE COMPANY, et al.,

On Appeal of 32 WEST RANDOLPH CORPORATION, SOUTHERN THEATRE PROPERTIES, INC., and CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, HENRY M. HENRIKSEN and JOHN R. THOMPSON JR., Trustees under the Will of John R. Thompson, Deceased,

Appellants.

29A

APPEAL FROM INTERLOCUTORY ORDER OF CIRCUIT COURT COOK COUNTY.

300 I.A. 611

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is an appeal by 32 West Randolph Corporation, Southern Theatre Properties, Inc., Continental National Bank and Trust Company of Chicago and Trustees under the will of John R. Thompson, deceased, from an interlocutory order of the Circuit Court of Cook County, wherein a receiver was appointed. The opinion filed concurrently herewith in case No. 40631 is controlling. A motion was made by appellees to dismiss the appeals of these three defendants. In our opinion, the rights of the defendants were affected by the order appointing the receiver. Therefore, the motion to dismiss the appeals is denied.

For the reasons stated in case No. 40631, the order of the Circuit Court of Cook County is reversed.

ORDER REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

40580

BISMARCK HOTEL CO., a corporation,
(Plaintiff) Appellant,
v.
JOHN G. WITTBOLD,
(Defendant) Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

30A

300 I.A. 612

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff, the Bismarck Hotel Company, a corporation, began an action in the Municipal Court of Chicago on September 18, 1937, against the defendant, John G. Wittbold, to recover $1,795, alleged to be owing by Wittbold as guarantor of the rent payable under a certain lease. The lease in question, which was executed on January 27, 1930, between the Randolph Hotel Company as lessor, (the name of which was changed, as provided by statute, to the Bismarck Hotel, a corporation) and Wittbold Investment Company as lessee, leased the premises known as Room 808 Metropolitan Building for a term ending April 30, 1933. This lease was signed by the defendant Wittbold as president of the Wittbold Investment Company and by him individually as a joint guarantor. The statement of claim set forth the balance owing for rent accrued, and alleged that the lessor and the defendant refused to pay the amount due upon request. To this statement, the defendant filed his affidavit of merits on October 4, 1937, and admitted the execution of the lease and guarant; The defendant further admitted rent had accrued under the lease, but denied any balance was owing the plaintiff, claiming that the accrued balance had been adjusted and settled with the plaintiff along with the balances owing under certain other leases. The case was tried before the court and resulted in a finding and judgment for the defendant on July 7, 1938.

The plaintiff subsequently made motions for a new trial and to vacate the judgment, both of which were overruled. It is from this judgment that the plaintiff appeals.

A0000

GIRARD MOTOR CO., a corporation,

(Plaintiff) in error,

v.

JOHN G. VIVIANO,

(Defendant) herein.

90 A

90 A. 613

NO. 13. Writ of error to the Circuit Court of Cook County.

The plaintiff, the Girard Motor Co., a corporation, began an action in the Municipal Court of Chicago on January 22, 1927, against the defendant, John G. Viviano, in trover for $1,750, alleged to be owing by Viviano on a promissory note of the year preceding under a partial issue. The issue in question, which was presented January 27, 1926, between the parties here concerning a lease, (the case of which was dismissed, as previous to, without, in the Municipal Court, a determination and trial) had been begun by lease, dated the preceding June 1, from the plaintiff-lessee to for a term ending April 30, 1926. This lease was signed by the defendant Viviano as president of the Triangle Transmission Company and by him individually as a joint guarantor. The contention of plaintiff was that the Triangle Company had not paid rentals, but claimed that the lessor and the defendant refused to pay the rental due April 1926. To this statement, the defendant filed in affidavit of merits on October 4, 1927, and denied the execution of the lease and guaranty. The defendant further claimed that the lessor was a trustee, but denied any Triangle was owing the plaintiff, claiming that the rentals had been adjusted and credited with the plaintiff, along with the Triangle owing under certain other leases. The suit was tried before the court and resulted in a finding and judgment for the defendant on July 7, 1928.

The plaintiff accordingly, made motions for a new trial and to vacate the judgment, both of which were overruled. In to from this judgment that the plaintiff appeals.

The defendant suggests that the foundation of the action is not a valid lease, void by reason of its being prohibited under the law, and calls our attention to the lease and urges that the lease on its face imports that it was a lease issued by a corporation under and by virtue of the Corporation Act; that plaintiff's right as lessor to recover was based upon a void instrument and therefore there could be no recovery. The defendant further suggests that where an act is done by a corporation beyond its legal powers the lease is void and of no legal effect. Therefore the question is whether this lease which was executed by the parties is void upon its face.

The lease, of course, is the subject of this litigation, and upon its face appears to be a lease from the Hotel Company to the Wittbold Securities Company for space known as Room 808 on the 8th floor of the building known as the Metropolitan Building. From an examination of the lease itself there is nothing which would indicate that the lease is void and is not within the charter powers granted to the plaintiff.

The rule by which the courts are guided in passing upon the question of whether a contract was entered into by a corporation, where the charge is made that the corporation was without power to enter into such contract, and which has been followed in innumerable cases, is that a party who has dealt with a corporation as an existing corporation and has received and used its property under an agreement with it, cannot, in a suit to collect the stipulated sum, be permitted to deny the corporate existence of such corporation. Gilmer Creamery Association v. Quentin, 142 Ill. App. 448. In that case the action was by the plaintiff to recover the amount due for rent, which was due under the terms of a written lease, and as the court has stated in that case:

The defendant suggests that the foundation of the action is not a valid lease, void by reason of its being prohibited under the law, and calls our attention to the lease and urges that the lease on its face indicates that it was a lease issued by a corporation under and by virtue of the Nonprofit-Corporation Act; that plaintiff's claim as lessee to recover was based upon a void instrument and therefore there could be no recovery. The defendant further suggests that where an act is done by a corporation beyond its legal scope the lease is void and of no legal effect. Therefore the question is whether this lease which was executed by the corporation is void ab initio.

The issue, of course, is the subject of this litigation, and upon its face appears to be a lease from the Civil Company to the Fitzhold Manufacturing Company for space known as Room 400 on the 4th floor of the building known as the Enterprise Building. Upon an examination of the lease itself there is nothing which would indicate that the lease is void and is not within the charter powers granted to the plaintiff.

The rule by which the courts are guided in deciding upon the question of whether a contract was entered into by a corporation, where the charge is made that the corporation was without power to enter into such contract, and which has been followed in innumerable cases, is that a party who has dealt with a corporation as an existing corporation and has received and used the property under its contract with it, cannot, in a suit to collect the stipulated pay, be permitted to deny the corporate existence of such corporation. Elmer Company Incorporation v. Lunstrom, 140 Ill. App. 444. In that case the action was by the plaintiff to recover the amount due for rent, which had due under the terms of a written lease, and in the court has stated in that case:

"Appellant having dealt with appellee as an existing corporation, and having received and used its property under an agreement with the corporation, cannot, in this suit to collect the agreed rent, be permitted to deny its corporate existence. Board of Education v. Bakewell, 122 Ill. 339; Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67."

In American University v. Wood, et al., 216 Ill. App. 189, this court held that the question whether there is a defect in the organization of a corporation which will prevent it from being a corporation de jure cannot be raised collaterally, but can be presented only in a direct proceeding by information in the nature of a quo warranto.

It has been held by the Supreme Court in the case of Eddleman v. Union County Traction Co., 217 Ill. 409, that the legal existence of a corporation can be questioned only in a direct proceeding by quo warranto, and not in a proceeding instituted by it to condemn land.

It is well to consider the provision of the revised statute upon the question of the defense of ultra vires. The statute provides in Par. 157.8, Sec. 8, Ch. 32, Corporations, Illinois Revised Stats. 1937.

"No conveyance or transfer by or to a corporation of property, real or personal, of any kind or description, shall be invalid or fail because in making such conveyance or transfer, or in acquiring such property, real or personal, the corporation, its board of directors, or any of its officers acting within the scope of the actual or apparent authority given to them by its board of directors, have in so doing exceeded any of the purposes or powers of the corporation.

No limitation upon the business, purposes, or powers of a corporation, expressed or implied in its articles of incorporation or implied by law, shall be asserted in order to defeat any action at law or in equity between the corporation and a third person or between a shareholder and a third person involving any contract to which the corporation is a party or any right of property or any alleged liability of whatsoever nature; but such limitation may be asserted:

(a) In a proceeding by a shareholder against the corporation to enjoin the doing of unauthorized acts of the transaction or continuation of unauthorized business. If the unauthorized acts or the business sought to be enjoined are being transacted pursuant to any contract to which the corporation is a party, the court may, if all the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing shall allow to the corporation or the other parties, as

"Appellant having dealt with himself as an individual corporation, and having procured and used the property under an agreement with the corporation, cannot, in this suit to enjoint the sale thereof, be permitted to deny its corporate existence. Court of Appeals v. Hardwick, 124 Ill. 547; Dunnwald v. Consolidated Ice Machine Co., 147 Ill. 67."

In Martinez Distillery v. Cook, et al., 216 Ill. 444, 454, this court said that the question whether there is a defect in the organization of a corporation which will prevent it from being a corporation de jure cannot be raised collaterally, but can be presented only in a direct proceeding by information in the nature of a quo warranto.

It has been held by the Supreme Court in the case of Ashman v. Union County Traction Co., 214 Ill. 604, that the legal existence of a corporation can be questioned only in a direct proceeding by quo warranto, and not in a proceeding instituted by it to quiet title.

It is well to consider the provision of the revised statute upon the question of the defense of ultra vires. The statute provides in Par. 147.6, sec. 3, Ch. 32, Construction, Illinois Revised Stats. 1937.

"No conveyance or transfer by or to a corporation of property, real or personal, of any kind or description, shall be invalid or full manner in making such conveyance or transfer, or in acquiring such property, real or personal, the corporation, its board of directors, or one of its officers acting within the scope of the actual or apparent authority given to them by its board of directors, have in no way exceeded any of the purposes or powers of the corporation.

No limitation upon the business, purposes, or powers of a corporation, stated or implied in its articles of incorporation or included by law, shall be construed in order to invest any person or persons, a corporation or a firm, person or persons, with any right to enjoin or prevent a corporation in a suit or any right of property or any alleged liability of shareholders; but such limitation may be asserted:

(a) In a proceeding by a shareholder against the corporation to enjoin the doing of unauthorized acts of the corporation or the commission of unauthorized contracts. If the unauthorized acts or the business deemed to be injured are being transacted pursuant to any contract to which the corporation is a party, the court may, if all the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing shall allow to the corporation or the other parties, or

the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained.

(b) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through shareholders in a representative suit, against the officers or directors of the corporation for exceeding their authority.

(c) In a proceeding by the State, as provided in this Act, to dissolve the corporation, or in a proceeding by the State to enjoin the corporation from the transaction of unauthorized business."

The defendant contends that it was not a lease issued by a corporation existing under the Corporation Act, and therefore the court was justified in ruling as it did. From the authorities we have cited it appears to be the rule, as stated, that the question of the legality of the organization cannot be attacked collaterally, and, for the reasons stated, the question was not one that should have been considered by the trial court.

From the evidence in the record it appears that two contracts were turned over by the Wittbold Securities Company to the plaintiff as collateral security that the Wittbold Securities Company would carry out its contract with the plaintiff, and from an examination of these contracts it appears that the defendant consented to the assignment of the contracts as security to the lessor and was not by such assignment released or discharged of his liability as guarantor.

On January 31, 1933, Wittbold Securities Company assigned two real estate contracts to the Central Republic Trust Company as trustee under a trust indenture made by the Randolph Hotel Company, which was then in possession of the premises. The contracts were by the terms of the instrument assigned "as security for the payment of any and all rents due and/or to become due * * * to the lessor or its assigns under a certain lease wherein Randolph Hotel Company is lessor and said Wittbold Investment Company is lessee." It appears there was evidence offered by the plaintiff which would indicate that $20.00

the same day to, amongst other, the loss of income sustained by reason of time spent by itself from the action of the owner in setting aside and fulfilling the instructions of this department, but antecedent thereto to be derived from the performance of the contract shall not be reached by the court as a loss or damage sustained.

(b) In a proceeding by the authorities, whether acting directly or through a receiver, trustee, or other legal representative, or through officers in a representative capacity, against the officers or directors of the corporation for exceeding their authority.

(c) In a proceeding by the state, as provided in this act, to dissolve the corporation, or in a proceeding by the state to enjoin the corporation from the prosecution of unauthorized business.'

The defendant contends that it was not a party thereto by a corporation existing under the Corporation Law, and therefore the court was justified in ruling as it did. From the authorities we have cited it appears to be the rule, in states, that the question of the legality of the organization cannot be raised collaterally, and, for the reasons stated, the question was not one that should have been considered by the trial court.

From the evidence in the record it appears that the contracts were turned over by the Fidelity Insurance Company to the Liberty as collateral security for the Fidelity Insurance Company would carry out the contracts with the obligee, and from an examination of these contracts it appears that the instruments constituted in the assignment of the contracts no security to the Liberty and was not by such assignment relieved of liability on guarantee.

On January 13, 1927, Fidelity Insurance Company assigned the real estate contracts to the United Commonwealth Trust Company in trust under a trust indenture made by the Pennsylvania Trust Company, which was then in possession of the premises. The contracts were by the terms of the instrument assigned "as security for the payment of any and all sums due and/or to become due " " to the Lessor or its assigns under a certain lease wherein Fidelity Total Company is lessor and said Fidelity Investment Company is lessee." It appears that no evidence offered by the plaintiff-appellee would indicate that Fidelity

was collected on account of the rent due and that this sum was applied in reduction of the rent account of Wittbold Securities Company. There is nothing in the assignment which in any way affected the liability of the defendant as guarantor, and it is well settled that the taking of collateral security does not effect a release, Penny v. Crane Bros. Mfg. Co. 80 Ill. 244 . The court said in that case:

> "The next point is, that taking a new note for fifteen hundred dollars as collateral security for the balance due on the note in suit, and the transfer of the collateral note, before its maturity, to the First National Bank, the note in suit all the time remaining in the possession, custody and control of appellees, and no transfer thereof having been made to the bank, without the knowledge or consent of appellant, discharged her from liability on her guaranty."

The collateral security in the instant case, as well as the lease, remained in the possession of the plaintiff and was not transferred. Therefore it comes within the rule announced by the Supreme Court in the case mentioned above.

There is also complaint in regard to the method of proving the amount due, and it is urged by the defendant that there was lack of evidence for the plaintiff upon this question. However, there was an examination of the books of the plaintiff from which it appeared that the evidence offered was the amount due the plaintiff, and in allowing the figures to be read into the record the court did not err.

The plaintiff points to the fact that the judgment was returned on July 7, 1938 by the court, who heard the evidence without a jury, and later the plaintiff moved for a new trial and to vacate the judgment. Upon consideration of the motions by the court they were denied, and upon the date of the denial of these motions the plaintiff filed its notice of appeal. The point is made by the defendant that the notice of appeal of the plaintiff was not filed within the ninety days, and therefore the court is without jurisdiction to entertain this appeal. This motion by the defendant was made for the first time in the defendant's brief.

was collected on account of the rent due and that this money applied in reduction of the rent account of itself. Surrillus company. There is nothing in the instrument which in any way affected the liability of the defendant as guarantor, and it is well settled that the taking of collateral security does not affect a release. Penny v. Corpus Juris, 24, 10. 50 Ill. 244). The court said in that case:

> "The next point is, that taking a note for fifteen hundred dollars as collateral security for the balance due on the note in suit, and the transfer of the collateral note, before the maturity, to the first national bank, the note in suit all the time remaining in the possession, custody and control of appellees, and no transfer thereof having been made to the bank, without the knowledge or consent of appellant, discharged her from liability on her guaranty.

The collateral security in the instant case, as well as the issue, remained in the possession of the plaintiff and was not transferred. Therefore it comes within the rule announced by the Supreme Court in the case mentioned above.

There is also complaint in regard to the amount of proving the amount due, and it is urged by the defendant that there was lack of evidence for the plaintiff upon this question. However, there was an examination of the books of the plaintiff from which it appeared that the evidence offered was the amount due the plaintiff, and in allowing the figures to be read into the record the court did not err.

The plaintiff points to the fact that the judgment was returned on July 7, 1899 by the court, who heard the evidence without a jury, and later the plaintiff moved for a new trial and to vacate the judgment. Upon consideration of the motions by the court they were denied, and upon the date of the hearing of these motions the plaintiff filed its motion of appeal. The point is made on the defendant that the notice of appeal of the plaintiff was not filed within the ninety days, and therefore the court is without jurisdiction to entertain this appeal. This motion by the defendant has

The court in the case of Gillis v. Jurzyna, 284 Ill. App. 174, upon a motion to dismiss the appeal, said:

> "Moreover, defendant first asked for a dismissal in his brief filed. The filing of the brief is held to be equivalent to a joinder in error, and by joinder in error the right to move to dismiss the writ is waived. Fread v. Hoag, 132 Ill. App. 233, Finlen v. Foster, 211 Ill. App. 609."

In the case of Connell v. North Town Motor Co., 297 Ill. App. 247, we in that opinion quote from Finlen v. Foster, 211 Ill. App. 609, the following:

> "In actual practice the filing of appellees' brief is held to be equivalent to a joinder in error. Truesdale v. Ford, 40 Ill. 80; DeBeukelaer v. People, 25 Ill. App. 460; Ferriss v. People, 71 Ill. App. 559; Fread v. Hoag, 132 Ill. App. 233; McCormick v. Higgins, 190 Ill. App. 241; Tobias v. Tobias, 193 Ill. App. 95.
>
> By joining in error appellees waived the right to move to dismiss the appeal. Matson v. Connelly, 24 Ill. 143; Brockway v. Bowley, 66 Ill. 99; Dinet v. People, 73 Ill. 183; Kane v. People, 13 Ill. App. 382; Fread v. Hoag, 132 Ill. App. 233; Kircher v. M. Keating & Sons Co., 145 Ill. App. 1; People v. Rudorf, 149 Ill. App. 315."

So, in the consideration of this question, and in view of the authorities cited, we are of the opinion that the court has jurisdiction to entertain the appeal taken by the plaintiff, and that the trial court erred in not entering judgment for the plaintiff for $1,795, the amount established by the evidence. Therefore, the judgment of the trial court is reversed and judgment entered here for $1,795.

REVERSED AND JUDGMENT HERE.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

The court in the case of Ellis v. Lucas, 124 Ill. App. 174, upon a motion to dismiss the appeal, said:

"Moreover, determining first cause for a dismissal in the brief filed. The filing of the brief is held to be equivalent to a joinder in error, and by joining in error the right to move to dismiss the writ is waived. Cook v. Lucas, 124 Ill. App. 173, Fulton v. Porter, 121 Ill. App. 409."

In the case of Gorski v. Lake View Lumber Co., 177 Ill. App. 447, we in this opinion quote from Ellis v. Lucas, 124 Ill. App. 173, the following:

"In actual practice the filing of appellant's brief is held to be equivalent to a joinder in error. Tuckerman v. Ford, 40 Ill. 60; Cunningham v. Ferris, 70 Ill. 489. Martin v. Cooper, 71 Ill. 547. Ward v. Ward, 124 Ill. App. 172; Bonnelyn v. Kinsler, 124 Ill. App. 41; Fulton v. Porter, 121 Ill. App. 409.

By joining in error appellee waived the right to move to dismiss the appeal. Tuckerman v. Ferris, 70 Ill. 489; Tuckerman v. Ferris, 40 Ill. 60; Ward v. Ferris, 70 Ill. 489; Bonne v. Kinsler, 124 Ill. App. 173; Ward v. Ward, 124 Ill. App. 172; Ellis v. Lucas, 124 Ill. App. 173; Martin v. Cooper, 71 Ill. 547; Fulton v. Porter, 121 Ill. App. 409; Gorski v. Lake View Lumber Co., 177 Ill. App. 447; Fulton v. Porter, 124 Ill. App. 173."

6. In the consideration of this question, and in view of the authorities cited, we are of the opinion that the court has jurisdiction to entertain the appeal taken by the plaintiff, and that the trial court erred in not entering judgment for the plaintiff for $1,750. The cause particularly by the evidence. Therefore, the judgment of the trial court is reversed and judgment entered for $1,750.

REVERSED AND JUDGMENT ENTER.

BRIER X. MCKINZIE, P.J. and CONLY, J. concur.

40615

LORAINE MARCOTT,

(Plaintiff) Appellee,

v.

L'UNION SAINT-JEAN BAPTISTE D'AMERIQUE, a Fraternal Beneficiary Society, incorporated under the laws of the State of Rhode Island,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

300 I.A. 612

MR. JUSTICE MEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered on October 26, 1938, vacating an order previously entered on July 14, 1938, in which the case had been dismissed for want of prosecution.

On September 30, 1938, the plaintiff filed a petition in the nature of a writ of error coram nobis. The defendant filed a motion to dismiss the plaintiff's petition, and after a hearing on the motion the court sustained the petition and vacated the order of July 14, 1938. The defendant elected to stand on its motion and has appealed from this order.

The plaintiff in her petition alleges that the case was set for trial before Judge Gridley on the sixth day of July, 1938, and further alleges that on that date the case was Number 64 on the list of cases to be added to the Trial Call, and that the plaintiff's attorney, Frank C. Leviton, asked Frank Sowa, the Clerk in the court room when the case would be reached for trial. The clerk replied:

> "It will not be reached this term, but will go over to the September term because it is too far away to be reached before court closes."

The case continued to be held on Judge Gridley's call, and on July 14, 1938, the case was called for trial and was dismissed for want of prosecution.

The title of the case appeared in the Chicago Law Bulletin Call every day from July 5, 1938, to July 13, 1938, and the issue

of July 13, 1938, showed that the case would be heard on July 14, 1938. The Chicago Law Bulletin of July 14, 1938, showed that the case had been dismissed on that day.

On September 30, 1938, the plaintiff filed her petition in the nature of a writ of error coram nobis. The defendant was given time to answer said petition, and filed a motion to dismiss the plaintiff's petition, and after a hearing on said motion, the court vacated the order of July 14, 1938.

The defendant contends that the plaintiff's attorney was negligent in not watching the trial court's call and noticing that the case had been dismissed, and that there was not such a mistake of fact which could be the basis for a petition in the nature of a writ of coram nobis, for the mistake of fact must be one, which if known, would have prevented the rendition or entry of the judgment.

The plaintiff calls our attention to the abstract of record on the question of negligence of the plaintiff's attorney, where it appears that -

> "The said Frank C. Leviton (attorney for the plaintiff) then informed the said Edmund S. Cummings (attorney for the defendant) of the conversation between the said Frank C. Leviton and Frank Sowa, the clerk assigned to Judge Gridley's courtroom, on the 8th day of July, 1938, and the said Edmund S. Cummings then informed the said Frank C. Leviton that he too was of the opinion that the above entitled cause would not be reached for trial during the month of July, 1938, but would be continued to the September, 1938, term thereof, and that he, the said Edmund S. Cummings paid no further attention to the call of the above entitled cause and did not appear before Judge Gridley on the 14th day of July, A. D. 1938, and, as a matter of fact, did not know that the above entitled cause had been dismissed for want of prosecution until after he had received the September, 1938, common law jury calendar, and failing to find the above entitled cause in said calendar, went to the office of the clerk of the Superior Court of Cook County and ascertained the order of dismissal entered in said cause on the 14th day of July, A. D. 1938."

So that when this cause was dismissed for want of prosecution on the last day of the court term before the summer vacation, neither counsel was present.

of July 12, 1926, showed that the case would be heard on July 14, 1926. The minutes for Saturday of July 14, 1926, showed that the case had been dismissed as that day.

On September 20, 1926, the plaintiff filed her petition in the Bureau of a writ of error coram nobis. The defendant was given time to answer said petition, and filed a motion to dismiss the plaintiff's petition, and after a hearing on said motion, the court vacated the order of July 14, 1926.

The defendant contends that the plaintiff's attorney was negligent in not attending the trial docket's call and advising that the case had been dismissed, and that there was not such a mistake of fact which would be the basis for a petition in the nature of a writ of coram nobis, for the mistake of fact must be one, which if known, would have prevented the rendition of entry of the judgment.

The plaintiff rests her position on the contrary of remedy on the question of negligence of the plaintiff's attorney, where it appears that -

"The said Frank G. Lewton (attorney for the plaintiff) then informed the said Edward F. Hopkins defendant's attorney (or defendant) of the conversation between the said Frank G. Lewton and Frank Lowe, the clerk assistant to Judge Pillsbury's auditorium, on the 9th day of July, 1926, and the said Edward F. Hopkins then informed the said Frank G. Lewton that he knew of the opinion that the above entitled cause would not be reached for trial during the month of July, 1926, but would be mentioned to the September, 1926, term thereof, and that he, the said Edward F. Hopkins had no further conversation in the well of the above entitled cause and did not appear before Judge Pillsbury on the 14th day of July, A. D. 1926, nor, as a matter of fact, did not know that the above entitled cause had been dismissed for want of prosecution until after he had received the November, 1926, session jury calendar, and finding on that the above entitled cause is still pending, and to the office of the clerk of the superior court of Cook County and ascertained the order of dismissal entered in said cause on the 14th day of July, A. D. 1926."

To that when this cause was dismissed for want of prosecution on the last day of the court term before the August vacation, neither counsel was present.

The general rule is that counsel is permitted to rely upon the information given by the clerk of the court as to the state of the court's calendar, and the fact that counsel relied upon such information does not of itself charge the plaintiff with negligence. This rule was followed in the case of Reid v. Chicago Railways Company, et al., 231 Ill. App. 58. It is a fact that had Judge Cridley known on July 14, 1938 that his clerk had given out the information that the case would go over until the following September, the court would not have entered the order that the case be dismissed for want of prosecution. On the contrary the court upon receiving such information would have continued the case to a future date. This rule was also followed in the case of Toth v. Samuel Phillipson & Co., 250 Ill. App. 247.

As we view the facts as they appear in the record we believe the court was justified in setting aside the order dismissing the cause for want of prosecution. The order is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

The general rule is that demurrer is sustained on only upon the information given by the clerk of the court as to the state of the court's records, and the fact that demurrer raised upon such information does not of itself change the plaintiff's negligence. This rule was followed in the case of Cain v. Chicago Railway Company, et al., 271 Ill. App. 98. It is a fact that Judge Gridley sums on July 16, 1938 that he knew but after his information that the case would go over until the following September, the court would not have entered the order that the case be dismissed for want of prosecution. In the history the court upon receiving such information would have continued the case to a future date. This rule was also followed in the case of Cain v. Chicago Railway Company, 271 Ill. App. 347.

It is also the duty of the court to the record to inform the court and justified in setting aside the order dismissing the cause for want of prosecution. The order is affirmed.

Order affirmed.

Mr. Justice, P.J., and McGoorty, J., concur.

40702

3333 WASHINGTON BOULEVARD BUILDING CORPORATION, a Corporation, JOSEPH SIEGEL and ROCHELLE SIEGEL,

(Plaintiffs) Appellants,

v.

R. G. FITCHIE and CLARA B. RUDOLPH,

(Defendants) Appellees.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

32A

300 I.A. 612[3]

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs from an interlocutory order entered February 8, 1939, appointing a receiver pendente lite for the 3333 Washington Boulevard Building Corporation. In this case the plaintiffs sought an injunction restraining the defendants from carrying out certain corporate resolutions which were alleged to be null and void. The application for the appointment of a receiver was made by the defendant, R. G. Fitchie in a petition and counterclaim presented during the hearing on the plaintiffs' motion for a temporary injunction. No evidence was heard by the court.

The plaintiffs filed their complaint on February 6, 1939, seeking a declaration by the court that certain corporate resolutions purported to have been passed by the defendants on February 4, 1939, were null and void, and an injunction restraining the defendants from enforcing or attempting to enforce the resolutions. The resolutions were designed to oust the present management of the plaintiff corporation by the plaintiff, Joseph Siegel, and to put the defendant, R. G. Fitchie, in charge of the plaintiff corporation's affairs.

The complaint alleges that the plaintiff, 3333 Washington Boulevard Building Corporation, is a corporation duly organized and existing under the laws of the State of Illinois; that the plaintiff, Joseph Siegel, is a stockholder, director, president and treasurer of the plaintiff corporation; and that the plaintiff, Rochelle Siegel,

is a stockholder of the plaintiff corporation. The complaint sets forth that the corporation was reorganized in a proceeding filed under Section 77-B of the Bankruptcy Act, and that the defendant, R. G. Fitchie, was appointed a member of the Bondholders' Committee created under the reorganization plan. The complaint further sets forth that Fitchie, instead of protecting the interests of the bondholders, interferred with the management of the debtor corporation and manipulated the affairs of the debtor corporation in such a manner as to depreciate the value of its bonds to a point where he could and did purchase large quantities of the bonds at a substantial saving.

The complaint further charges that the outstanding bonds of the plaintiff corporation were cancelled and stock issued to the former bondholders; that a special meeting was held of the plaintiff corporation as reorganized, and the plaintiff, Joseph Siegel, and the defendants, R. G. Fitchie and Clara B. Rudolph, were elected directors. A special meeting of the new Board of Directors was held on September 17, 1938, at which meeting the plaintiff Joseph Siegel was elected the president and treasurer, and also employed as manager of the property and affairs of the plaintiff corporation. The complaint sets forth that the plaintiff Joseph Siegel thereupon entered into the management of the property and the affairs of the plaintiff corporation and performed his duties as manager, and that his operation of the plaintiff corporation reflected a substantial profit.

The complaint then charges that a special meeting of the board of directors of the plaintiff corporation was held on February 4, 1939; that at that time the defendant, Clara B. Rudolph, was not a stockholder of the plaintiff corporation, and therefore not qualified to act as a director of the corporation at the meeting, but did cast, what the defendants claimed to be the deciding vote

is a stockholder of the plaintiff corporation. The complaint sets forth that the corporation was incorporated in a proceeding filed under section 77-B of the bankruptcy act, and that the defendant, H. G. Fitzhie, was appointed a member of the bondholders' committee created under the reorganization plan. The complaint further sets forth that Fitzhie, instead of protecting the interests of the bondholders, interfered with the management of the debtor corporation and manipulated the affairs of the debtor corporation in such a manner as to depreciate the value of its bonds to a point where he could buy its bonds in quantities of the bonds at a substantial saving.

The complaint further charges that the outstanding bonds of the plaintiff corporation were transfered and stock issued to the former bondholders; that a special meeting was held of the plaintiff corporation on February, and the plaintiff, Joseph Siegel, and the defendants, H. G. Fitzhie and Alex H. Mahlon, were elected directors. A special meeting of the new board of directors was held on September 17, 1938, at which meeting the plaintiff Joseph Siegel was elected the president and treasurer, and also employed as manager of the property and affairs of the plaintiff corporation. The complaint sets forth that the plaintiff Joseph Siegel thereupon entered into the management of the property and the affairs of the plaintiff corporation and performed his duties as manager, and that his operation of the plaintiff corporation realized a substantial profit.

The complaint then charges that a special meeting of the board of directors of the plaintiff corporation was held on January 4, 1939; that at that time the defendant, Alex H. Mahlon, was not a stockholder of the plaintiff corporation, and therefore not qualified to act as a director of the corporation at the meeting, but did act, that the defendants claimed to be the deciding vote

upon each of the resolutions presented at the meeting. On the day the complaint was filed, February 6, 1939, a notice was served on the defendants that the plaintiffs would, on the following day, February 7, 1939, move the court for the issuance of a temporary injunction. Plaintiffs' motion for a temporary injunction was presented on February 7, and a hearing thereon was had and continued to February 8, 1939. On the afternoon of February 7, 1939, the defendants' attorneys served the plaintiffs with notice that they would on the following day present the verified petition of R. G. Fitchie asking that leave be given the defendants to file a cross-complaint within a reasonable time to be fixed by the court, and also asking for the appointment of a receiver for the plaintiff corporation. Upon receipt of this notice the plaintiffs served notice that they would move the court on February 8, 1939, for the dismissal of their complaint and the case without prejudice. Upon the hearing of plaintiffs' motion for a temporary injunction on February 8, 1939, counsel for the defendants presented the petition of the defendant Fitchie and a cross-complaint signed and sworn to by the same defendant on February 8, 1939, and asked leave to file instanted the cross-complaint of Fitchie, as well as the petition described in the notice served on the previous day. The plaintiffs then made the following alternative motions: (1) For the dismissal of their complaint and this cause without prejudice, (2) for an immediate ruling on their motion for a temporary injunction, and (3) for a dismissal of their complaint for want of equity. The court continued the plaintiffs' motion for an immediate ruling on their motion for a temporary injunction and denied the plaintiffs' motion for dismissal of the case without prejudice and for dismissal of the case for want of equity. The court at said time granted the defendant R. G. Fitchie leave to file instanter his petition and cross-complaint,

upon each of the resolutions presented at the meeting. On the 17th the complaint was filed, January 5, 1938, a motion was served on the defendants that the plaintiffs would, on the following day, February 7, 1938, move the court for the issuance of a temporary injunction. Plaintiffs' motion for a temporary injunction was presented on February 7, and a hearing thereon was had and continued to February 8, 1938. On the afternoon of February 7, 1938, the defendants' attorneys served the plaintiffs with notice that they would on the following day present the verified petition of J. G. Fitzhie praying that leave be given the defendants to file a cross-complaint within a reasonable time to be fixed by the court, and also asking for the appointment of a receiver for the plaintiff corporation. Upon receipt of this notice the plaintiffs served notice that they would move the court on February 8, 1938, for the dismissal of their complaint and the case without prejudice. Upon the hearing of plaintiffs' motion for a temporary injunction on February 8, 1938, counsel for the defendants presented the petition of the defendant Fitzhie and a cross-complaint signed and sworn to by the same defendant on February 8, 1938, and asked leave to file tendered the cross-complaint of Fitzhie, as well as the petition described in the notice served on the previous day. The plaintiffs then made the following alternative motions: (1) for the dismissal of their complaint and this cause without prejudice, (2) for an immediate ruling on their motion for a temporary injunction, and (3) for a dismissal of their complaint for want of equity. The court overruled the plaintiffs' motion for an immediate ruling on their motion for a temporary injunction and granted the defendant's motion for dismissal of the case without prejudice and for dismissal of the bill for want of equity. The court at said time granted the defendant G. G. Fitzhie leave to file immediately his petition and cross-complaint,

and that the cross-complaint stand as an answer to the complaint filed by the plaintiffs, and the court in the same order appointed George Dubin receiver of the plaintiff corporation, and directed him to take immediate charge and possession of the real estate, as well as all the property of the plaintiff corporation and to manage and operate said properties.

The cross-complaint of the defendant R. G. Fitchie alleges that he is a stockholder and duly elected and qualified director of the plaintiff corporation; that on February 4, 1939, a special meeting of the board of directors of the corporation was held, at which time the entire board was present and various resolutions were adopted terminating the management of Joseph Siegel and directing that all compensation to him cease immediately; that at this meeting Joseph Siegel, president, and one of the plaintiffs herein, declared that none of the resolutions adopted at the special meeting were valid for the reason that in his opinion said Clara R. Rudolph was not a proper director, and that at the meeting Joseph Siegel stated he would not surrender possession of the premises and would not abide by the resolutions ousting him as manager. It is further alleged that unless the court, by its proper officers, takes possession of all the assets of the corporation, and its books and records, including stock records, until the issues herein are determined or until a special meeting of the stockholders is held, irreparable damage will be caused and the assets of the corporation will be wasted and dissipated.

It is further alleged that the contract purported to be entered into between the corporation and Joseph Siegel, engaging him as a manager for five years with compensation of $65. per week, plus an apartment, or in the event the apartment is not occupied by him its equivalent in cash payable weekly as a salary, be

and that the cross-complaint stands as an answer to the complaint filed by the plaintiffs, and the court in the case cross-complained before this receiver of the plaintiff corporation, had limited him to take immediate charge and possession of the real estate, as well as all the property of the plaintiff corporation and to manage and operate said properties.

The cross-complaint of the defendant J. G. Hughes alleges that he is a stockholder and duly elected and qualified director of the plaintiff corporation; that on February 4, 1920, a special meeting of the board of directors of the corporation was held, at which time the whole Board was present and various resolutions were adopted terminating the employment of Joseph Siegel and directing that all compensation to him cease immediately; that at this meeting Joseph Siegel, president, and one of the directors herein, declared that none of the resolutions adopted at the special meeting were valid for the reason that it is his opinion that J. Hughes was not a proper director, and that at the meeting Joseph Siegel stated he would not entertain possession of the premises and would not abide by the resolutions passed at the meeting. It is further alleged that unless the court, by its proper efforts, takes possession of all the assets of the corporation, and its books and records, including stock records, until the issues herein are determined or until a special meeting of the stockholders is held, irreparable damage will be caused and the assets of the corporation will be wasted and dissipated.

It is further alleged that the defendant authorized to be entered into between the corporation and Joseph Siegel, employing him as a manager for five years with compensation of $50. per week, plus an expense, or in the event the agreement is not complied by him its equivalent in some periods amounting as a salary, he

immediately cancelled and determined. Therefore the prayer of the cross-complaint is that an order be entered terminating and immediately canceling the management contract purported to be entered into between the plaintiff corporation and Joseph Siegel; that all acts of the board of directors at its special meeting on February 4, 1939 be declared valid, and that the resolutions adopted by the Board of directors at its special meeting be given full force and effect, and that if in the opinion of the court the best interests of the estate will be served, a special meeting of the stockholders shall be called under the supervision of the court, and that pendente lite, a manager or receiver be appointed by the court, with the usual powers of receivers in chancery, to take charge of the business affairs and the management of the property owned by the plaintiff corporation and located at 3333 Washington Boulevard, Chicago, Illinois, known as the "Chatfield Hotel". So that upon an examination of the order entered by the court, it appears:

> "1. That the defendant R. G. Fitchie be and he is hereby granted leave to file instanter his petition and cross-complaint and said cross-complaint to stand as well as the answer of R. G. Fitchie to the complaint herein.
> 2. That the motion of the plaintiff herein to dismiss the complaint herein be and the same is hereby denied."

Thereupon the court ordered that George Dubin be and he was appointed receiver to take immediate charge and possession of the real estate in question, and all of the property belonging to the corporation, including the books of account and corporate records, and he was empowered to operate, manage and lease said real estate, to employ assistants, make necessary purchases and such disbursements as were necessary and requisite in the operation and management of the hotel. It was further provided that George Dubin file his receiver's bond in the sum of $5,000 within ten days, and that R. G. Fitchie file his cross-plaintiff's bond in the sum of $200 within the same period of time.

immediately cancelled and determined. Therefore the prayer of the cross-complaint is that an order be entered rescinding and immediately cancelling the assignment instrument purported to be passed into between the plaintiff corporation and James Hagel; that all acts of the board of directors at its special meeting on February 6, 1929 be declared void, and that the resolution adopted by the board of directors at its special meeting on April fourth and effect, and that it is the opinion of the court the best interests of the estate will be served, a special meeting of the stockholders shall be called under the supervision of the court, and that Mabelle Lite, a member on receiver be appointed by the court, with the usual power of receivers in chancery, to take charge of the business affairs and the management of the property owned by the plaintiff corporation and located at 2224 Washington Boulevard, Chicago, Illinois, known as the "Sheffield Hotel". As that upon an examination of the order entered by the court, it appears:

"1. That the defendant G. G. Fischer be and he is hereby granted leave to file instanter his initial and cross-complaint and file cross-complaint to stand as well as the answer of G. G. Fischer to the complaint herein.

2. That the motion of the plaintiff herein to dismiss the complaint herein be and the same is hereby denied."

Therefore the court ordered that George Tuchs be and he was appointed receiver to take immediate charge and management of the real estate in question, and all of the property belonging to the corporation, including the books of account and corporate records, and he was empowered to operate, manage and lease said real estate, to employ janitors, make necessary improvements and such disbursements as were necessary and regulate in the ownership and management of the hotel. It was further provided that George Tuchs file his receiver's bond in the sum of $5,000 within ten days, and that G. G. Fischer file his cross-plaintiff's bond in the sum of $500 within the same period of time.

The complaint charges that the only allegations in the cross-complaint pretending to state any grounds for the appointment of a receiver are found in paragraph 5 thereof, which reads as follows:

> "5. That unless this court, by and through its proper officers, takes possession of all of the assets of the plaintiff corporation and all of its books and records, including stock records, until the issues herein are determined or until a special meeting of the stockholders is held under the supervision of this court, irreparable damage will be caused and the assets of said corporation will be wasted and dissipated."

And the plaintiffs call the attention of the court to the fact that in the petition or cross-complaint of Fitchie there is no allegation that the plaintiff corporation was insolvent or in danger of becoming insolvent; that there is no charge in the petition or cross-complaint that the plaintiff corporation had been or was being mismanaged or that its assets were being wasted or dissipated; so that we quite agree with the suggestion of the plaintiff that the interlocutory order must stand or fall upon the pleadings as they existed at the time the order was entered, and we have indicated in our opinion the proceedings as they occurred prior to the date when the appeal was taken by the plaintiffs.

In a discussion of the merits of the controversy, Section 86 of the Business Corporation Act of 1933 (1937 Ill. Rev. St. Ch. 32, Par. 157.86, Sec. 86,)now gives courts of equity power to liquidate corporations and to appoint receivers upon the suit of a shareholder. The provision of the act that is pertinent is as follows:

> "(1) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
> (2) That the acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent; or
> (3) That the corporate assets are being misapplied or wasted."

From an examination of the cross-complaint filed by leave of court in which the cross-complaint applies for the appointment of a receiver, there is no allegation of fact which would indicate the necessity for the appointment of a receiver. There is no

The complaint states that the only allegations in the cross-complaint pertinent to a cause of action for the appointment of a receiver are found in paragraph 3 thereof, which reads as follows:

"3. That unless this court, by and through its proper officers, takes possession of all of the assets of the plaintiff corporation and all of its books and records, including stock records, until the issues herein are determined or until a special meeting of the stockholders is held under the supervision of this court, irreparable damage will be caused and the assets of said corporation will be wasted and dissipated."

And the plaintiffs call the attention of the court to the fact that in the petition or cross-complaint of Vicente Ibarra is no allegation that the plaintiff corporation has insolvent or is debtor of insolvent; that there is no charge in the petition or cross-complaint that the plaintiff corporation has been or is being mismanaged or that the assets were being wasted or dissipated; so that we quite agree with the proposition of the plaintiff that the interlocutory order must stand or fall upon the allegations as they existed at the time the order was entered, and we have indicated in our opinion the propriety of the court's action prior to the time when the appeal was taken by the plaintiffs.

In a discussion of the merits of the motion, section 22 of the Business Corporation Act of 1908 (1907 Ill. Gen. Ex. Ch. 32, Par. 107, Ed. Jur. 32,) has given courts of equity power to liquidate corporations and be equitable receivers when the suit of a stockholder.

The provision of the act that is material is as follows:

"(1) That the directors are insolvent in the management of the corporate affairs and the stockholders are unable to break the deadlock, and it is irreparable injury to the corporation is being sustained or is threatened by reason thereof; or
(2) That the acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent; or
(3) That the corporate assets are being misapplied or wasted."

From an examination of the cross-complaint filed by Ibarra of court in which the cross-complaint sought for the appointment of a receiver, there is no allegation of fact which would indicate the necessity for the appointment of a receiver. There is no

allegation of fact charging that the corporate affairs or its assets were being misapplied or wasted; in fact the only alleg tion that is made - and which is but a conclusion - is based largely upon certain resolutions passed by the board of directors, which, as we have previously indicated, do not show that the assets of the corporation were being dissipated. We are of the opinion there is not sufficient justification for the appointment of a receiver based upon the allegations in the cross-complaint filed by the cross-complainant R. G. Fitchie, and for that reason we think the court erred in entering the order appointing a receiver. The order appointing a receiver is reversed.

ORDER REVERSED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

allegation of fact charging that the corporate affairs of its assets were being dissipated or wasted; in fact the only allegation that is made - and which be but a conclusion - is based largely upon certain resolutions passed by the board of directors, which, we do not particularly believe, do not show that the assets of the corporation were being dissipated. In our of the opinion there is not sufficient justification for the appointment of a receiver based upon the allegations in the cross-complaint filed by the cross-complainant K. G. Ziemba, and for that reason we think the court erred in appointing the order appointing a receiver. The order appointing a receiver is reversed.

CROSS REVERSED.

DILLE & McCLATCHY, P.L. AND BRYAN, J. DUNCOM.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JAN 26 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9382 Agenda No. 21

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1938

LaSalle Extension University,
a Corporation,

Appellant

vs.

Thomas E. Tucker,

Appellee.

Appeal from County Court
Kankakee County.

HUFFMAN - J.

Appellee, on January 31, 1935, signed what is designated as an Application for Membership in the Department of Higher Accountancy in appellant corporation. The down payment provided for in the application for enrollment was changed from $50 to $30, and the monthly payments were changed from $15 to $6. It was provided therein that the monthly payments should be due and payable on the 20th day of each month. At the time of signing the application for membership enrollment, appellee also signed a note in the sum of $130, payable to appellant, evidencing the balance due upon his application for membership. This note provided that it was to be paid to appellant in monthly installments of $6 each, payable on the 20th day of each month, beginning with March 20, 1935, until paid.

When the first shipment of books was received by appellee, he returned them to appellant without opening. This was soon after the contract and note were signed. Later, and in the month of July following, he received a similar package of books from appellant, which he likewise returned without opening. He states that the books were transmitted by mail and that the postage was about twenty-two cents. This constituted all of the transactions between the parties. After maturity of the note, appellant sued appellee in a

Gen. No. 9382 Opinde No. 21

IN THE
SUPREME COURT OF THE STATE
SECOND DISTRICT

OCTOBER TERM, A. D. 1936

LaSalle Extension University,
a Corporation,

Appellant

Appeal from County Court
Kankakee County.

vs.

Thomas E. Tucker,

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HUFFMAN - J.

Appellee, on January 21, 1935, signed what is described as an Application for Membership in the Department of Higher Accountancy in appellant corporation. The down payment provided for in the application for enrollment was changed from $50 to $30, and the monthly payments were changed from $15 to $6. It was provided therein that the monthly payments should be due and payable on the 20th day of each month. At the time of signing the application for membership enrollment, appellee also signed a note in the sum of $130, payable to appellant, evidencing the balance due upon his application for membership. This note provided that it was to be paid to appellant in monthly installments of $8 each, payable on the 20th day of each month, beginning with March 20, 1935, until paid.

When the first shipment of books was received by appellee, he returned them to appellant without opening. This was soon after the contract and note were signed. Later, and in the month of July following, he received a similar package of books from appellant, which he likewise returned without opening. He states that the books were transmitted by mail and that the postage was about twenty-two cents. This constituted all of the transactions between the parties. After maturity of the note, appellant sued appellee in a

Justice of the Peace court, where it recovered a judgment against him for $130, which was the principal sum named in the note. Appellee prosecuted an appeal from that judgment to the county court of Kankakee County, where the case was tried by jury and the jury found the issues for the defendant (appellee). Appellant prosecutes this appeal from the judgment of the court entered on the verdict.

In the trial of the case in the county court, appellant called as its only witness, the appellee. He testified that he signed the note in question; that the books received by him were returned; that at a later date they were again sent to him and again returned to appellant; that he received nothing in the way of physical property, books or lesson sheets, which he retained; that he could not state what books were contained in the packages received, as he did not open them. This constituted appellant's testimony. The note was introduced in evidence and appellant rested its case. The appellee then took the witness stand on his own behalf. He introduced in evidence the application for membership in appellant corporation in the Department of Higher Accountancy. This instrument is too long to incorporate in this opinion. Appellee testified that appellant's Salesman, Eggen, was the person who secured his application for membership; that he had seen appellant's advertising in the magazines; that one package of books was received soon after the signing of the note and application for membership; that he immediately returned this package unopened; that later in the summer, he received another package similar to the first, which he returned to appellant unopened. He states that the foregoing constituted the extent of the transactions between him and appellant.

It is insisted by appellant that this suit is based entirely upon the note; that it has nothing to do with the application for membership or enrollment; that they were independent promises; and that the court erred in refusing to instruct the jury to find for appellant. It is insisted by appellee that the suit is based upon the application for membership in the Department of Higher Accountancy

justice of the peace court, where it recovered a judgment against him for $130, which was the principal sum named in the note. Appellee prosecuted an appeal from that judgment to the county court of Kenosha County, where the case was tried by jury, and the jury found the issues for the defendant (appellee). Appellant prosecutes this appeal from the judgment of the court entered on the verdict.

In the trial of the case in the county court, appellant called as its only witness, the appellee. He testified that he signed the note in question; that the books received by him were returned; that at a later date they were against sent to him and again returned to appellant; that he received nothing in the way of physical property, books or lesson sheets, which he retained; that he could not state what books were contained in the packages received, as he did not open them. This constituted appellant's testimony. The note was introduced in evidence and appellant rested its case. The appellee then took the witness stand on his own behalf. He introduced in evidence the application for membership in appellant corporation in the Department of Higher Accountancy. This instrument is too long to incorporate in this opinion. Appellee testified that appellant's salesman, Eggen, was the person who secured his application for membership; that he had seen appellant's advertising in the magazines; that one package of books was received soon after the signing of the note and application for membership; that he immediately returned this package unopened; that later in the summer, he received another package similar to the first, which he returned to appellant unopened. He states that the foregoing constituted the extent of the transactions between him and appellant.

It is insisted by appellant that this suit is based entirely upon the note; that it has nothing to do with the application for membership or enrollment; that they were independent promises; and that the court erred in refusing to instruct the jury to find for appellant. It is insisted by appellee that the suit is based upon the application for membership in the Department of Higher Accountancy

in appellant corporation; that the note is but an incident to the enrollment contract and that the measure of damages to which appellant is entitled, is limited to the loss sustained by it because of appellee's breach thereof.

Appellant cites the case of the International Text Book Co. v. Martin, 220 Mass. 1, 108 N.E. 469, in support of its position that the promises between appellant and appellee were independent promises and therefore the promissor must perform his promise and bring cross-action if the other party fails to perform. In that case, a minor son enrolled with the plaintiff for a course of instruction in telephone engineering. The father signed a guaranty to the effect that the price agreed to be paid for the course of instruction would be paid according to the terms of the subscription agreement. Suit was brought on the guaranty to recover the unpaid installments, which amounted to $53.40. The father admitted that he read the contract between the plaintiff and his son, and that the same was by the terms of the guaranty incorporated into the guaranty contract. Two defenses were set up; First, that the son was not in default in the payment of installments due, and second, that misrepresentations were made by the agent of the plaintiff when the contract was signed by the son.

The action was by the plaintiff against the father to recover the balance due on a written contract between plaintiff and the defendant's minor son, which contract the defendant had guaranteed in writing. The court in that case held the promise to furnish the instruction and the promise to pay therefor, to be independent and not dependent promises, and permitted recovery against the father for payments remaining due the plaintiff. It is there recognized that in case of dependent promises, a party to an executory contract may stop performance by the other party either by explicit directions or renunciation and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. The rule with reference to independent promises as followed in that

in appellant corporation; that the note is but an incident to the enrollment contract and that the measure of damages to which appellant is entitled, is limited to the loss sustained by it because of appellee's breach thereof.

Appellant cites the case of the International Text Book Co. v. Martin, 220 Mass. 1, 108 N.E. 466, in support of its position that the promises between appellant and appellee were independent promises and therefore the promisor must perform his promise and bring action if the other party fails to perform. In that case, a minor son enrolled with the plaintiff for a course of instruction in telephone engineering. The father signed a guaranty to the effect that the price agreed to be paid for the course of instruction would be paid according to the terms of the subscription agreement. Suit was brought on the guaranty to recover the unpaid installments, which amounted to $52.40. The father admitted that he read the contract between the plaintiff and his son, and that the same was by the terms of the guaranty incorporated into the guaranty contract. Two defenses were set up; first, that the son was not in default in the payment of installments due, and second, that misrepresentations were made by the agent of the plaintiff when the contract was signed by the son.

The action was by the plaintiff against the father to recover the balance due on a written contract between plaintiff and the defendant's minor son, which contract the defendant had guaranteed in writing. The court in that case held the promise to furnish the instruction and the promise to pay therefor, to be independent and not dependent promises, and permitted recovery against the father for payments remaining due the plaintiff. It is there recognized that in case of dependent promises, a party to an executory contract may stop performance by the other party either by explicit directions or renunciation and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. The rule with reference to independent promises as followed in that

case is taken from notes to Pordage v. Cole, 1 Saunders, 319,320, and is announced as follows: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." This rule has been recognized in the case of Powers Reg. Co. v. Hoffman, 169 Ill. App. 657, 660.

It is also urged by appellant that the fact the defendant changed his mind after enrolling for the course ofinstruction, and refused to proceed therewith, is no defense against his liability to pay the full amount of the contract, and in this connection reference is made to the case of Moore v. LaSalle Extension University, 146 Okla. 88. In that case the defendant enrolled in appellant institution for a course of instruction in traffic management. Suit was instituted upon the note signed by the defendant. Defendant denied liability, claiming that he had an understanding with the plaintiff's agent that the agent would hold all papers connected with the transaction until after the defendant had had an opportunity to examine same and to determine if he wished to pursue such course; and that upon examination of the books and papers to be sent him, if the defendant decided that he did not wish to pursue the course, that the agent agreed the deal would be off and that his note and the other papers would be returned to him. The agent did not so retain the enrollment application and note, but forwarded them to the plaintiff, whereupon certain books and consignments of lessons and instruction material were sent to the defendant. Following that, the defendant had correspondence with the plaintiff to the effect that he had no time to study and that he was returning the books and other material. After some correspondence and by consent of the defendant, the books and papers were returned to him.

case is taken from notes by Lothrop v. Cole, 1 Wendell, 314,324, and is announced as follows: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the doing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." This rule has been recognized in the case of Powers Dep. Co. v. Williams, 169 Ill. App. 627, 630.

It is also urged by appellant that the fact the defendant changed his mind after enrolling for the course of instruction, and returned to proceed therewith, is no defense against the liability to pay the full amount of the contract, and in this connection reference is made to the case of Moore v. Lasalle Extension University, 145 Ill. App. In that case the defendant enrolled in appellant's institution for a course of instruction in traffic management. Suit was instituted upon the note signed by the defendant. Defendant denied liability, claiming that he had an understanding with the plaintiff's agent that the agent would hold all papers connected with the transaction until after the defendant had had an opportunity to examine same and to determine if he wished to pursue such course; and that upon examination of the books and papers to be sent him, if the defendant decided that he did not wish to pursue the course, that the agent agreed the deal would be off and that his note and the other papers would be returned to him. The agent did not so retain the enrollment application and note, but forwarded them to the plaintiff, whereupon certain books and consignments of lessons and instruction material were sent to the defendant. Following that, the defendant had correspondence with the plaintiff to the effect that he had no time to study and that he was returning the books and other material. After some correspondence and by consent of the defendant, the books and papers were returned to him.

Following this, the defendant continued with the contract, making subsequent payments until he had received forty-four out of the forty-seven consignments of lessons and instruction material which were to be sent him. The court in its opinion states that the only defense was that there was no delivery of the note by the defendant to plaintiff. It appears that although the defendant did return the books, yet upon his consent they were again shipped to him, and that he continued the course of instruction under the contract, receiving forty-four out of a total of forty-seven lessons which were to be furnished him. The three remaining consignments of lessons were all that remained for the plaintiff to do in order to complete the contract. The plaintiff did not make the final renunciation of his contract until after he had received the forty-fourth consignment of lessons and instruction material. With reference to this situation, the court states: "The defendant received the initial and complete first installment of books, instructions, etc., about the middle of May, 1925, and at regular intervals thereafter he received similar consignments without protest, other than as noted hereinbefore, up until April 5, 1926, at which time forty-four out of forty-seven consignments had been sent to and retained by defendant. The remainder were subject to his call. These articles were not returned until July, 1926." The court found that the acceptance by defendant of the performance of the contract by the plaintiff and the unexplained retention by him of the material sent, for such a length of time, precluded his defense made. And in conclusion, the court states; "Defendant's whole defense rested upon his right to examine the books, etc., sent to him by plaintiff, and decide then whether or not he would go forward with the contract. His subsequent decision to abide by the contract, his payment thereon, and his long acceptance of the benefits, would seem to strike down his defense and make the same now unavailable."

It is held in International Text Book Co. v. Jones, 166 Mich. 86, 88, that a party to an executory contract may stop the performance thereof by the other party by explicit direction or by renunciation

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It is held in International Text Book Co. v. Jones, 185 Mich. 86, 88, that a party to an executory contract may stop the performance thereof by the other party by explicit direction or by renunciation

thereof and the refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. To the same effect are the cases of International Text Book Co. v. Marvin, 166 Mich. 660, 668; International Text Book Co. v. Roberts, 168 Mich. 501, 506; International Text Book Co. v. Schulte, 151 Mich. 149.

It is generally considered that where one of the parties to an executory contract repudiates it before its performance is finished, either by notice of recission or by refusal of further performance, without adequate cause, the other party thereupon has a right of action for all such damages as he may have sustained by reason of such recission or abandonment. It is also a general rule in the construction of contracts, that two contemporaneous writings, where they are between the same parties, relate to the same subject matter, are mutually dependent, and constitute in fact but one contract, may be construed and considered together in actions between the parties. This rule has been frequently applied in the case of a note and a contemporaneous agreement in writing, such agreement being construed as a part of the same contract for the purpose of explaining or controlling the terms of the former. Such cases are generally where the agreement constituted the consideration for which the note was given. It would appear in this case that the enrollment or membership agreement constituted the consideration for the note given. They are so mutually connected with each other, as to in fact comprise but one transaction between the parties. The note was but an incident of the enrollment contract and would not have arisen except for same. We do not consider them subject to the rule applied to independent promises.

Appellant offered no proof of damages based upon appellee's renunciation of his contract, but based its claim for recovery solely upon the note. There were no pleadings in the case and this court must take the record as it finds it. The application for membership

thereof and the refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. To the same effect are the cases of International Text Bk. Co. v. Barron, 164 Mich. 626, 628; International Text Book Co. v. Roberts, 168 Mich. 321, 326; International Text Book Co. v. Roberts, 161 Mich. 149.

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Appellant offered no proof of damages based upon appellee's renunciation of his contract, but based its claim for recovery solely upon the note. There were no pleadings in the case and this court must take the record as it finds it. The application for membership

set out in detail the price of the course of instruction and the manner in which the same was to be paid. The note merely evidenced the unpaid balance appearing due in the application, and provided for payment thereof in the same manner as set out therein.

Appellee repudiated his contract upon receipt of the first shipment of books and material from appellant. He returned each shipment immediately upon receipt of same. After return of the second shipment, appellant took no further steps with respect to appellee's course of instruction. Appellant offered no proof of damages based upon defendant's renunciation of his agreement. It does not assign error upon its failure to have awarded to it such damages as might have flowed from the appellee's refusal to proceed with his contract, and such point is not argued in this court. Therefore, this court has not considered the question of nominal ~~qx~~ damages.

We are of the opinion the judgment of the county court is right.

Judgment affirmed.

set out in detail the price of the course of instruction and the manner in which the same was to be paid. The note clearly evidenced the unpaid balance appearing due in the application, and provided for payment thereof in the same manner as set out therein.

Appellee remunerated his contract upon receipt of the first shipment of books and material from appellant. He returned each shipment immediately upon receipt of same. Upon return of the second shipment, appellant took no further steps with respect to appellee's course of instruction. Appellant offered no proof of damage based upon defendant's repudiation of his agreement. It does not assign error upon its failure to have awarded to it such damages as might have flowed from the appellee's refusal to proceed with his contract, and such point is not argued in this court. Therefore, this court has not considered the question of nominal ~~an~~ damages.

We are of the opinion the judgment of the county court is right.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9213

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JAN 26 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9373 Ag. No. 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1938

34A

Andrew B. Henderson,

Plaintiff-Appellant

vs.

Willard Johnson, Ralph S. Zahm,
Guardian ad Litem for said
Willard Johnson, a Minor, et al.,

Defendants-Appellees.

Appeal from Circuit
Court, Winnebago
County.

WOLFE, J.

An automobile which was being driven on Fifteenth Avenue in the City of Rockford, Illinois, by O. T. Henderson, Jr., in which the plaintiff, Andrew B. Henderson was riding as a guest, collided with the car of Emil Johnson, being driven by his agent, Willard Johnson, the defendant, and the plaintiff was injured. The plaintiff started a suit against the defendants in the Circuit Court of Winnebago County, and alleged in the first two counts of his petition, that just prior thereto, and at the time of the collision, he was in the exercise of ordinary care for his own safety, but on account of the negligent manner in which the defendant, through his agent, operated his car, the plaintiff sustained injuries.

The third count of the petition alleges the physical facts to be the same, as in prior counts, and then charges the defendants, "Did wilfully, wantonly and maliciously drive, operate and manage the automobile of Emil Johnson, defendant, at a high rate of speed to-wit: thirty-five to forty miles per hour directly at and towards the automobile in which the plaintiff was then and there riding and which said automobile was in plain view of the defendant, Emil Johnson by his agent, Willard Johnson and in plain view of the Defendant Willard Johnson, and in such a location that the defendants, either by

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 19[illegible]

Andrew B. Henderson,

Plaintiff-appellee,

vs.

Willard Johnson, Ralph [illegible],
Guardian ad Litem for [illegible]
Willard Johnson, a minor, et al.,

Defendants-appellees.

Appeal from the Circuit
Court, Winnebago
County.

MOLER, J.

An automobile which was being driven on Fifteenth Avenue in the City of Rockford, Illinois, by C. T. Henderson, Jr., in which the plaintiff, Andrew B. Henderson was riding as a guest, collided with the car of Emil Johnson, being driven by his agent, Willard Johnson, the defendant, and the plaintiff was injured. The plaintiff started a suit against the defendants in the Circuit Court of Winnebago County, and alleged in the first two counts of his petition, that just prior thereto, and at the time of the collision, he was in the exercise of ordinary care for his own safety, but on account of the negligent manner in which the defendant, through his agent, operated his car, the plaintiff sustained injuries.

The third count of the petition alleges the physical facts to be the same, as in prior counts, and then charges the defendants, "Did wilfully, wantonly and maliciously drive, operate and manage the automobile of Emil Johnson, defendant, at a high rate of speed to-wit: thirty-five to forty miles per hour directly at and towards the automobile in which the plaintiff was then and there riding and which said automobile was in plain view of the defendant, Emil Johnson by his agent, Willard Johnson and in plain view of the Defendant Willard Johnson, and in such a location that the defendants, either by

themselves or their agent, saw the automobile containing the plaintiff, or by the exercise of ordinary care, could and should have seen said automobile containing the plaintiff in ample time to have prevented a collision between the automobile of Emil Johnson, defendant." The plaintiff further avers that said defendants by their agent and by themselves wilfully, wantonly and maliciously drove the automobile of Emil Johnson, the defendant, directly at and against the automobile containing the plaintiff.

To this petition, the defendants filed an answer denying all the material allegations of negligence and wilful and wanton conduct on the part of the defendants, and charge that the accident occurred on account of the contributory negligence of the plaintiff.

The case was tried before a jury. At the close of all the evidence, the defendants entered a motion to withdraw the third count of the complaint from the consideration of the jury. This motion was sustained, and the third count was dismissed. The jury found the issues for the defendant. Judgment was entered on the verdict, and it is from this judgment that this appeal is brought.

First, it is insisted that the Court erred in withdrawing the 'wilful and wanton count' of the plaintiff's petition from the consideration of the jury. This count charged that the defendant wilfully and wantonly drove his car at the rate of speed of thirty-five to forty miles per hour, and ran into the car, which the plaintiff was driving. So far as the abstract shows, the sufficiency of the petition was not challenged, but the defendants filed a general denial of each charge, and went to trial upon that issue. Mr. Andrew B. Henderson, in his testimony, stated that when he saw the automobile of the defendant coming from the north, it was seventy-five or eighty feet away, and was going between thirty-five and forty miles per hour, and from the time it entered the intersection, he did not notice any change in the speed of the automobile. Here was positive testimony to sustain the third count of the plaintiff's petition. There is other testimony in the record sustaining the third count, namely,

themselves or their agent, saw the automobile containing the plaintiff, or by the exercise of ordinary care, could and should have seen said automobile containing the plaintiff in ample time to have prevented a collision between the automobile of Mrs. Johnson, defendant." The plaintiff further avers that said defendants by their agent and by themselves wilfully, wantonly and maliciously drove the automobile of Mrs. Johnson, the defendant, directly at and against the automobile containing the plaintiff.

To this petition, the defendants filed an answer denying all the material allegations of negligence and wilful and wanton conduct on the part of the defendants, and charge that the accident occurred on account of the contributory negligence of the plaintiff.

The case was tried before a jury. At the close of all the evidence, the defendants entered a motion to withdraw the third count of the complaint from the consideration of the jury. This motion was sustained, and the third count was dismissed. The jury found the issues for the defendant. Judgment was entered on the verdict, and it is from this judgment that this appeal is brought.

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that there was no obstruction of any kind to prevent the defendants from seeing the plaintiff for a short time before their car entered the intersection, up to and at the very moment of the collision. This testimony, if taken alone, would be sufficient to sustain the third count of the plaintiff's petition, and the same should have been presented to the jury for consideration.

The defendant's instruction No. 6, given by the Court, is as follows to-wit:"6. The Court instructs the jury that at the time of the happening of the accident in question there was in force and effect a statute of the State of Illinois as follows:--"Chapter 165, Paragraph 68: Vehicles approaching or entering intersection. Except as hereinafter provided, motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." You are further instructed that if you believe from a preponderance of the evidence in this case, that the defendant, at the time and place in question, was entitled to the right of way over the automobile in which the plaintiff was riding, and that the proximate cause of the collision was the failure of the driver of the automobile, in which the plaintiff was riding, to accord to the defendant the right of way, then you shall find the defendant not guilty."

This form of instruction has repeatedly been criticized both by our Supreme Court and all of our Appellate Courts. It would seem clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection

that there was no obstruction of any kind to prevent the defendants from seeing the plaintiff for a short time before their car entered the intersection, up to and at the very moment of the collision. This testimony, if taken alone, would be sufficient to sustain the third count of the plaintiff's petition, and the case would have been presented to the jury for consideration.

The defendant's instruction No. 6, given by the Court, is as follows to-wit:"6. The Court instructs the jury that at the time of the happening of the accident in question there was in force and effect a statute of the State of Illinois as follows:--"Chapter 165, Paragraph 58: Vehicles approaching or entering intersection. Except as hereinafter provided, motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." You are further instructed that if you believe from a preponderance of the evidence in this case, that the defendant, at the time and place in question, was entitled to the right of way over the automobile in which the plaintiff was riding, and that the proximate cause of the collision was the failure of the driver of the automobile, in which the plaintiff was riding, to accord to the defendant the right of way, then you shall find the defendant not guilty."

This form of instruction has repeatedly been criticized both by our Supreme Court and all of our Appellate Courts. It would seem clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection

before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one "approaching from the right" within the meaning of the statute, and so as to require such driver to stop or yield the right of way. Riddle vs. Mansager 254, Ap., 68, Munns vs. City of Chicago Railway Co., 235 App., 160; Swartz vs. Lindquist 251, Ill. App., 320.

The Appellee, in his brief, cites many cases to support his contention that the instructions will be considered as a series, and that if all the instructions taken together state the law applicable to the case, the judgment appealed from, should be affirmed. This is a correct statement of the law, but it does not apply when an erroneous instruction directs a verdict. An erroneous instruction that directs a verdict cannot be cured by another instruction that properly states the law. The defendant's instruction number 6, was erroneous, and should not have been given. The Court refused to give instruction number 2, and 5, for the plaintiff. We have examined these two refused instructions, and we think they properly set forth the law as therein stated.

The judgment of the Circuit Court of Winnebago County is hereby reversed and the case remanded for a new trial.

Reversed and Remanded.

before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one "approaching from the right" within the meaning of the statute, and so as to require such driver to stop or yield the right of way. Middle va. Chicago 224, 40., 88, Hanna va. City of Chicago Railway Co., 223 App., 1o9; Swartz va. Lindquist 221, Ill. App., 450.

The appellee, in his brief, cites many cases to support his contention that the instructions will be so liberal as a matter, and that if all the instructions taken together state the law applicable to the case, the judgment appealed from, should be affirmed. This is a correct statement of the law, but it does not really mean an erroneous instruction times a certain. An erroneous instruction that directs a verdict cannot be cured by providing instructions that properly state the law. The defendant's instruction number 5, was erroneous, and should not have been given. The court refused to give instruction number 7, and 1, as for the plaintiff. We have examined these two refused instructions, and we think they properly set forth the law as therein stated.

The judgment of the Circuit Court of Winnebago County is hereby reversed and the case remanded for a new trial.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9369

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

300 I.A. 613

BE IT REMEMBERED, that afterwards, to-wit: On MAR 7 - 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9369 Ag. No. 16

In the Appellate Court of Illinois

Second District

October Term, A. D. 1938.

Ella O'Brien, Della Larkin, Frances Kramer Mauricau and Agnes Kramer,
(Plaintiffs) Appellees,

vs.

Henry W. Voss, James Luster, Josephine Maly, Clifford Lindsey, Bessie Turner, Willis J. Woodward, Clara Marvin, Fred Austin, Frank Borella, Loretta Galligan, Charles Lindquist, Mrs. George Barras, Charles Russ, Horace Barnes, Philip Kaiser, John P. Danwerk Jerome Stewart, James Morgan, W. H. Lennon, May Hurley, (Nelle A. Leary Dillon, as Administratrix of the Estate of James Shields, Deceased, Appellant), William M. Knutson, Receiver of Will County National Bank of Joliet, Illinois, now in liquidation, George Schoettes, Thomas H. Radigan, Margaret Duggan, Patrick W. Fitzgerald, Margaret McFarland and J. Bert Blackburn, Acting Recorder of Deeds of Will County, Illinois, successor in Trust to George J. Clare, Deceased,
(Defendants.)

Appeal from the Circuit Court of Will County, Illinois

WOLFE, J.

The firm of W. H. Clare and Company is located in Joliet and during the years from 19 26 to 1930, and prior thereto, engaged in the business of loaning money. It secured its loans by trust deed on real estate. A borrower of the firm's money executed a promissory note, or notes for the amount of the loan and conveyed his real estate as security by trust deed to George J. Clare. In some such transactions, as above indicated, the loan, or debt was evidenced by notes of different amounts, all of which equalled the amount of the loan. The firm sold and delivered its notes, thus acquired, to its customers, kept a record of the purchasers of the notes, collected the interest when due, and paid it to the holder of each note, as therein stipulated. As a usual practice, the firm credited the interest paid on the back of such note.

Said George J. Clare, an attorney at law, examined the abstracts of title to the real estate offered as security for loans, decided upon the advisability of making loans, and was (in a word), the head of the firm. He died before the hearing of the evidence in the case at bar. William P. Lowrey, Sr., who remained as the office manager of the firm after Mr. Clare's death, was a witness in the case. Mr. Lowrey's duties as office manager during the time in question were of a clerical nature, such as selling notes of the firm, receiving payments of interest, crediting the payments and distributing the interest to the holders of the notes on which interest had been paid.

On February 23, 1926, the firm of W. H. Clare and Company loaned $10,000.00 to Henry W. Voss. Voss and his wife executed on that date, fifteen promissory notes payable to their order four years after date; five of said notes being for $1,000.00 and ten of the notes being for $500.00, with interest at six per cent payable semi-annually, at the office of W. H. Clare and Company. All the notes were endorsed by the makers and delivered to W. H. Clare and Company. To secure the notes, Voss and his wife conveyed three tracts of land in Joliet, known in the record here as tracts A, B and C, by trust deed to George J. Clare, trustee. The trust deed recites that "the property thirdly above described" (being tract A) "is subject to a certain trust deed dated July 2, 1923, recorded in Book 602 page 10, and is taken in this trust deed simply as additional security." The trust deed of July 2, 1923, to George J. Clare, trustee, secured a debt of $8,000.00. The trust deed of February 23, 1926, was duly recorded in the office of the Recorder of Will County on the same day W. H. Clare and Company sold the notes secured by this trust deed, to its customers, retained possession of the trust deed, and acted as agent of the purchasers of the notes in the usual course of its business, as above stated. The names of the persons who bought these notes, and the date of purchase, does not

appear in the record by direct testimony.

On July 7, 1928, Voss and his wife signed and delivered to W. H. Clare and Company, their seventeen promissory notes, of that date, due in five years, totalling $13,000.00. Nine of the notes being for $1,000.00 and eight for $500.00. To secure the notes, Voss and his wife executed a trust deed of that date, conveying to George J. Clare, trustee, said parcels of land known as tracts A, B and C. This trust deed recites, "Out of the money hereby secured, the grantors covenent to pay and discharge a certain trust deed dated July 2, 1923, recorded in Book 602, page 10, which was made forthe principal sum of $8,000.00."

It also appears that after the trust deed of July 7, 1928, was executed, there was paid a series of four notes of Voss's totalling $4,500.00, exclusive of interest thereon, which were payable to the Mokena State Bank. These notes evidenced loans which Voss received from the bank at different times. The notes were secured by a trust deed made on October 22, 1927, on tracts A, B and C to one Milton C. Geuther, trustee, for $10,000.00 as blanket security for loans which Voss might receive from the bank from time to time. The trust deed to Geuther was released and discharged of record on July 9, 1928. Voss left the transaction of his financial affairs in charge of George J. Clare. It is our conclusion that the object of the trust deed of July 7, 1928, and the notes thereby secured, was to consolidate the two debts of Voss of $8,000.00 and $4,500.00.

On August 23, 1930, six months before the notes secured by the trust deed of February 23, 1926, were due and on an interest paying date thereof, Voss and his wife executed thirteen promissory notes payable to their order five years after date. Seven of the notes being for $1,000.00 each, six for $500.00 each, with principal and interest, at six per cent, payableat the office of W. H. Clare and Company. The notes were endorsed by the makers. To secure the notes,

or the total debt evidenced by the notes, Voss and his wife executed a trust deed, on that date, to George J. Clare, trustee, on tracts A, B and C. Thetrust deeds of 1926 and 1930, are substantially the same. The trust deed of August 23, 1930, recites: "Troperty thirdly described" (tract A) "being subject to a trust deed for $15,000.00 dated July 7, 1928, and recorded in Book 705, page 97." The trust deed of August 23, 1930, was recorded on August 26, 1930. The trust deed dated February 23, 1926, has never been released on the records in the Recorder's office of Will County.

W. H. Clare and Company sold the seventeen notes secured by the trust deed of July 7, 1928, and the holders are: George Schoettes, Ella O'Brien, Della Larkin, Thos. H. Radigan, Margaret Duggan, P. W. Fitzgerald, F. K. Mauricau, Agnes Kramer and Margaret McFarland. The notes secured by the trust deed of August 23, 1930, are held by the following persons: W. H. Lennon, three notes for $1,000.00 each; George Schoettes, one note for $1,000.00; May Hurley, three notes for $1,000.00 each and one note for $500.00; P. W. Fitzgerald, four notes for $500.00 each; James Shield's Estate, one note for $500.00.

On June 18, 1936, the nine owners of the notes secured by the trust deed of July 7, 1928, and George J. Clare, trustee, filed in the Circuit Court of Will County, their complaint to foreclose that trust deed. Voss and his wife, the tenants in possession of the tracts, W. H. Lennon, May Hurley and James Shields, holders of the notes of the 1930 series, were made defendants to the complaint, which is in the usual form and alleges that the trust deed of August 23, 1930, is subject, junior and subordinate and inferior to the trust deed of July 7, 1928. Our attention is directed by counsel for the holders of the notes secured by the trust deed of July 7, 1928, to the fact that the complaint is verified by the affidavit of William P. Lowrey, Sr., office manager for W. H. Clare and Company. When the bill was

filed, George J. Clare was living. Said counsel, also calls attention to the fact that James Shields, the administratrix of whose estate appears here as sole appellant, filed his written entry of appearance and consented that immediate default might be taken against him in the above foreclosure suit.

The above named George Schoettes is the owner of three notes for $1,000.00 each secured by the trust deed of July 7, 1928, and the owner of one note for $1,000.00 secured by the trust deed of 1930. On November 10, 1937, George Schoettes, and Thomas H. Radigan, Margaret Duggan and Margaret McFarland, holders of notes secured by the trust deed of 1928, upon their motion, were dismissed as parties plaintiff to the above foreclosure complaint, and made parties defendants thereto, with leave to file an answer and cross-bill to the original complaint. Thereupon, they filed their answer and cross-bill which is in substance to the effect that the trust deed of February 23, 1926, has not been released of record, although the notes thereby secured, had been fully paid; and that the court should order a formal release of the trust deed of February 23, 1926.

Upon motion of James Shields, the cross-complaint was stricken. On December 13, 1937, leave was granted by the court to plaintiffs, to file an amended complaint. Ella O'Brien, Della Larkin, Frances Kramer, F. K. Mauricau and Agnes Kramer, remaining plaintiffs in the original complaint, filed an amended complaint to foreclose the trust deed dated July 7, 1928. Allegations of the amended complaint so far as material to the question raised in this court are as follows: That the trust deed dated July 7, 1928, was duly executed and recorded; that before the trust deed of 1928 was recorded, tracts A, B and C were encumbered by a trust deed dated February 23, 1926, to secure notes for $10,000.00, said trust deed of 1926 being a first lien on tracts B and C and a second lien on tract A. That on August 23, 1930, Voss and his wife executed a

trust deed to secure promissory notes for $10,000.00; that the last mentioned notes were obtained by the holders thereof, by the surrender of the notes described, the payment of which was secured by the trust deed dated February 23, 1926; that the notes secured by the trust deed of February 23, 1926, were exchanged by the holders thereof, for the notes secured by the trust deed of August 23, 1930; that the notes secured by the trust deed of February 23, 1926, and the notes secured by the trust deed of August 23, 1930, evidenced the same indebtedness; that upon issuance of the notes secured by the trust deed of August 23, 1930, the notes secured by the trust deed of February 23, 1926, were cancelled; that the trust deed of February 23, 1926, has never been released and discharged of record.

The amended complaint further recites: "And the plaintiffs ask the court to determine all questions of priority of liens created by the several trust deeds mentioned; that the court will determine and declare by proper decree, the rights of all holders and owners of notes, the payment of which in secured by said trust deeds, or either thereof; that the court will determine and by proper decree, declare the legal effect of the several trust deeds mentioned and the rights of the holders and owners of all of the above described promissory notes in said real estate and each tract thereof, as security for the payment of said notes, holding the liens created by said trust deeds superior to all other liens, except taxes, general and special".

The answer of James Shields, one of the holders of notes dated August 23, 1930, is substantially the same as the amended complaint, which alleges in brief, that the purpose of the trust deed dated August 23, 1930, and the notes therein described, was to extend the time of payment of notes of like amount and that there was no intention on the part of the holders of said mortgage notes, described in either of said trust deeds, or on the part of the grantee in said trust deeds described, to release the first lien on tract 3 and

C nor the second lien on tract A created by the trust deed of August 23, 1926; and that the said persons had no intention to subordinate said lien of the trust deed of August 23, 1926, to the trust deed of July 7, 1928, but on the contrary, it was the intention of said persons to continue the lien of the trust deed dated February 23, 1926.

The answer of the defendants, George Schoettes, Thomas H. Radigan, Margaret Duggan and Margaret McFarland, calls for strict proof of the allegations of the amended complaint that the notes secured by the trust deed dated August 23, 1930, were exchanged for the notes dated February 23, 1926, and that the notes evidenced the same indebtedness. It alleges that the notes secured by trust deed dated February 23, 1926, were paid, and that said trust deed should be released of record. The substance of the answer may be summarized as follows: Defendants aver and charge the truth to be that the trust deed dated July 7, 1928, is a first mortgage lien on tracts A, B and C and deny that trust deed dated August 23, 1930, securing notes for $10,000.00, is a first lien on tracts B and C; charges the truth to be that the indebtedness created and secured by trust deed dated August 23, 1930, is subject, junior and inferior to the lien created by the trust deed of July 7, 1928.

Patrick W. Fitzgerald filed an answer, neither admitting nor denying the allegations of the amended complaint, requiring strict proof thereof. All defendants, excepting George Schoettes, Thomas H. Radigan, Margaret Duggan, Margaret McFarland, James Shields and J. Bert Blackburn, successor in trust to George J. Clare, were defaulted.

The hearing on the amended complaint and the answers thereto, was before the chancellor. We decide that under the terms of the trust deed dated August 23, 1930, reciting, "Property thirdly described" (tract A) "being subject to a trust deed for $13,000.00 dated July 7, 1928, and recorded in Book 705, page 97;" that the trust

deed of July 7, 1928, became a first lien on tract A to the full amount of $13,000.00. The notes secured by the trust deed of 1930 were accepted by the holders with the above quoted recital therein. We further hold that there is nothing in the trust deeds involved in this case, showing or indicating that the lien created by the trust deed dated February 25, 1926, was released or waived, otherwise than as recited in the trust deedsof August 25, 1930, as above quoted.

When the trust deed of August 23, 1930, was drawn, it was known to George J. Clare and Voss that the trust deed of July 7, 1928, was on record as appears from the recital quoted from the trust deed of August 23, 1930. William P. Lowrey, Sr., office manager for W. H. Clare and Company, believed that the firm sold only notes secured by first trust deeds or mortgages. He never examined the title to real estate mortgages of the firm. We are satisfied that he firmly believed when he verified the original complaint to foreclose the trust deed of July 7, 1928, that it was a lien on tracts A, B and C as set forth in that complaint which was prepared by his son, attorney William P. Lowrey, Jr. William P. Lowrey, Sr., was a witness on the hearing and there is nothing in his testimony indicating that he was not a fair and credible witness. Failure to produce the books and records of W.H. Clare and Company was not the fault of Mr. Lowrey, Sr.

James Shields, one of the holders of the notes secured by the trust deed of 1930, died before the hearing. W. F. Lennon and May Hurley, also owners of such notes of 1930, were defaulted, and did not appear as witnesses. F. W. Fitzgerald, holder of one note, secured for $500.00 by the trust deed of 1928 and four notes of $500.00 each secured by the trust deed of 1930, did not a pear as a witness. George Schoettes, one of the appellees, and owner of three notes for $1,000.00 each of the 1928 series and one note for $1,000.00 of the 1930 series, did not appear as a witness.

William P. Lowrey, Sr., testified substantially as hereafter set forth relative to the transaction of the execution of the notes secured by trust deed of August 23, 1930. "I handled the notes dated August 23, 1930, through the office of W. H. Clare and Company. I have the notes described in the trust deed of February 23, 1926. They were returned by the holders in exchange for renewals. They were exchanged for notes on this same property. The notes described in the trust deed dated August 23, 1930, are the notes which I gave in exchange for the notes dated February 23, 1926. I received the cancelled notes all under date of February 23, 1926, in place of another issue that was made to take the place of these notes, and as far as I can remember I cancelled them myself. The other issue was for the same principal amount as these and they are the notes described in the trust deed dated August 23, 1930. I have a recollection of having personally delivered the various notes of the 1930 issue to the various owners thereof. I would not say it was all done on the same day. I could not say it was done over a considerable period. It was done at intervals, over how long I don't know." He also testified that he could not tell who the owners of the 1926 series were, nor could he specifically name the owners of the notes of 1930, without referring to the records of W. H. Clare and Company. The records were not called for by any party to the foreclosure suit. The evidence of the witness, Lowrey, is uncontradicted.

In the decree of foreclosure, the court recites that it was not advised upon the hearing, as to the ownership of the notes secured by the trust deed of February 23, 1930, but that such notes were duly paid and cancelled after their maturity; that said trust deed should be released of record, by the successor in trust of George J. Clare. "The court further finds as a fact, that the notes secured by the trust deed, dated August 23, 1930, were not made to renew or extend the loan secured by the trust deed, dated February 23, 1926,

and that the payment of the notes secured by the trust deed of February 23, 1926, was absolute payment and that the lien of said last before mentioned trust deed did, and does not enure to the benefits of the holders and owners of the notes secured by the trust deed of August 23, 1930."

Mr. Voss testified that he owed $23,000.00 on the three tracts known as tracts A, B and C. That the notes secured by the trust deed of February 23, 1926, and the notes secured by the trust deed dated August 23, 1930, evidenced the same indebtedness, is a fact established by the testimony of Lowrey, Sr., and Voss. The amended complaint alleged that these notes evidenced the same indebtedness, and that the notes secured by the trust deed of February 23, 1926, were exchanged for the notes secured by the trust deed of August 23, 1930. The allegations of the complaint were proved.

There is no evidence in the record showing a novation, that is, that the notes secured by the trust deed of August 23, 1930, were given and received as full settlement and payment of the debt secured by the trust deed of February 23, 1926. There is no proof in the record that the owners of the notes secured by the trust deed of August 23, 1930, or any one, advanced or paid money to discharge and pay the notes secured by the trust deed of February 23, 1926. The evidence is that the notes were exchanged as renewals.

There are no paramount equities in favor of the holders of the notes secured by the trust deed of July 7, 1928. There are no circumstances of the transaction of the execution of the notes secured by the trust deed of August 23, 1930, or other extrinsic evidence, indicating an intention of the owners of the notes secured by the trust deed of February 23, 1926, to subordinate the lien created by the intervening trust deed of July 7, 1928. (Roberts v. Doan, 100 Ill. 187; Campbell v. Trotter, 100 Ill. 81; Christie v. Hale, 46 Ill. 117; Shaver v. Williams, 87 Ill. 469; 33 A. L. R. 149; 98 A. L. R. 843; Everts v.

Lawthorp 165 Ill. 487; Baker v. Salzenstein, 314 Ill. 236, Richardson v. Hockenhull, 85 Ill. 194).

There has been a sale of the real estate under the foreclosure decree. The facts in the case, as a matter of law, do not sustain the decree fixing the priorities of the trust deeds. The case will be remanded to the Circuit Court of Will County to modify its decree of foreclosure in conformity to the views herein expressed.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On APR 20 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9337 Agenda No. 3

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1938.

Warren Horgan and Mae Horgan,

Appellees

vs.

City Trust & Savings Bank of Kankakee, a Corporation, Trustee,

Defendant.

and

Charles V. Maloney,

Appellant.

Appeal from Circuit Court, Kankakee County

36 A

HUFFMAN - J.

Mr. Charles Horgan was a resident of the city of Kankakee, during the time in question in this suit. He had cancer of the throat, from which disease he died on May 29, 1937, at the age of seventy-two. Appellee, Warren Horgan, was his stepson and had lived with him for many years. Charles V. Maloney, appellant, was his nephew. Mr. Charles Horgan had been a practicing attorney in the city of Chicago, until his affliction forced his retirement, whereupon he removed to the city of Kankakee. This was about a year prior to his death. On March 4, 1937, he executed a trust agreement with the defendant City Trust and Savings Bank of Kankakee, whereby the sum of $20,000 was deposited with said trust company as a trust fund, from which the sum of $20 per week was to be paid to appellee Warren Horgan, after the death of Mr. Charles Horgan. The trust was designated as a spendthrift trust and based upon the incapacity of the said Warren Horgan to protect his property rights, because of his habitual and excessive use of intoxicating liquor. The residue of the trust was to become the absolute property of

the defendant Charles V. Maloney of New York City. Mr. Horgan reserved the right to revoke the trust. On April 15, 1937, Mr. Horgan amended the trust by providing that if appellee Warren Horgan should marry and desire to purchase a farm, that the trust company should, if the wife of the said Warren Horgan consented, allow him to withdraw from the trust fund a sum of money not to exceed $10,000, for the purchase of any such farm, the title thereto to be taken in the names of Warren Horgan and his wife, in joint tenancy. On May 10, 1937, Warren Horgan married, and his wife went to live in the residence occupied by Mr. Charles Horgan and his stepson Warren. On the following day, May 11, 1937, Mr. Horgan amended the trust agreement by revoking the amendment of April 15th (with respect to the trustee advancing to Warren, a sum not to exceed $10,000 for the purchase of a farm), and by said amendment of May 11, excluded Warren from withdrawing any money with which to buy a farm. The trust and all of the foregoing amendments were accepted by the trust company. On May 27, 1937, Warren Horgan first learned from the trust company, that the amendment to the trust of April 15th, permitting him to buy a farm, had been revoked by the amendment of May 11th, whereupon he secured the services of an attorney, who came to the residence that evening, where a will was prepared, which was executed by Mr. Charles Horgan by his mark, and which document directed that the trust company should apply $10,000 of the money in its hands for the purchase of a farm for Warren Horgan, such farm to be selected by him, and that the balance of the $20,000 in the hands of the trust company, should be paid to Warren Horgan at the rate of $20 per week. It was determined the next day by Mr. Warren Horgan and his Attorney that the will was ineffectual as a modification of the trust, whereupon an amendment to the trust was prepared, re-establishing the rights of appellee Warren Horgan to the benefit of the $10,000 for the purchase of a farm. In other words, the amendment of May 28, 1937, sought to reestablish the amendment of April 15, 1937, which had been revoked by the amendment of May 11, 1937. This last amend-

the defendant Charles F. Maloney of New York City. Mr. Morgan reserved the right to revoke the trust. On April 15, 1937, Mr. Morgan amended the trust by providing that if appellee Warren Morgan should marry and desire to purchase a farm, that the trust company should, if the wife of the said Warren Morgan consented, allow him to withdraw from the trust fund a sum of money not to exceed $10,000, for the purpose of any such farm, the title thereto to be taken in the names of Warren Morgan and his wife, as joint tenants. On May 10, 1937, Warren Morgan married, and his wife went to live in the residence occupied by Mr. Charles Morgan and his stepson Warren. On the following day, May 11, 1937, Mr. Morgan amended the trust agreement by revoking the amendment of April 15th (with respect to the trustee advancing to Warren, a sum not to exceed $10,000 for the purchase of a farm), and by this amendment of May 11, enjoined Warren from withdrawing any money with which to buy a farm. The trust and all of the foregoing amendments were accepted by the trust company. On May 27, 1937, Warren Morgan first learned from the trust company, that the amendment to the trust of April 15th, permitting him to buy a farm, had been revoked by the amendment of May 11th, whereupon he secured the services of an attorney, who came to the residence that evening, where a will was prepared, which was executed by Mr. Charles Morgan in his home, and which document directed that the trust company should apply $10,000 of the money in its hands for the purchase of a farm for Warren Morgan, such farm to be selected by him, and that the balance of the $50,000 in the hands of the trust company, should be paid to Warren Morgan at the rate of $20 per week. It was determined the next day by Mr. Warren Morgan and his attorney that the will was ineffectual as a modification of the trust, whereupon an amendment to the trust was prepared, re-establishing the rights of appellee Warren Morgan to the benefit of the $10,000 for the purchase of a farm. In other words, the amendment of May 28, 1937, sought to reestablish the amendment of April 15, 1937, which had been revoked by the amendment of May 11, 1937. This last amend-

ment to the trust on May 28, 1937, was likewise executed by Mr. Horgan by his mark. He died that night. The trust company refused to accept the last amendment of May 28, 1937. Its action in this regard left standing in full force and effect the original trust agreement of March 4, 1937, whereby the spendthrift trust was created for appellee Warren Horgan, and under which he was to receive the sum of $20 per week. Upon refusal of the trust company to accept the last amendment of May 28, 1937, appellee Warren Horgan and his wife brought this suit in equity, seeking a decree to compel the defendant trust company to accept and abide by the amendment to the trust made on May 28, 1937. The trial court rendered a decree in favor of appellees, thereby upholding the said amendment.

Answers of the trust company and Charles V. Maloney were filed, which set up lack of capacity on the part of Mr. Charles Horgan on the day in question; that the modification of the trust executed on that day was procured by duress and undue influence, by persons standing in a fiduciary relationship toward him; that Mr. Horgan had for a long period of time been kept under the influence of morphine on account of his physical condition, and that the purported modification on May 28th, was v oid and of no force or effect.

The question presented by this appeal is one of fact. The amendment of May 28th was executed by Mr. Horgan by his mark, and witnessed by W.M. Durham, who was the real estate agent interested in the sale and purchase of the farm in question; and by Emma Dornburg, who was employed in the household of Mr. Horgan during the last two weeks of his illness; and by the attorney who had drawn the attempted will on May 27th and who was present and drew the amendment of May 28th. The Attorney was not acquainted with Mr. Horgan.

It appears that the deceased, prior to his affliction, was actively engaged in the practice of law; that he was a man weighing in the neighborhood of one hundred seventy pounds, and that prior to his death he had become emaciated until he weighed but about seventy-five or

sent to the trial on May 28, 1927, and filmsing executed by Mr. Morrow by his mark. He died that night. The first attorney retained to assist the last mentioned of our ex, 1927. The action in this matter had absolute in full force and effect the 3rd first instant commencement of March 4, 1927, wherein the complainant sought and obtained the appellee herein Morrow, and dated which he was to receive the sum of $[illegible] per week. Upon refusal of the first complaint to accept the [illegible] of [illegible] 28, 1927, appellee Morrow [illegible] and [illegible] suit to equity, asking a decree be issued the interested lower attorney be accept and abide by the agreement to the effect made on Mar 4, 1927. The trial court rendered a decree in favor of appellee, hence, appellant the said agreement.

Answer of the trial attorney and [illegible] [illegible] filed, which set up lack of capacity on the part of Mr. Morrow on the day in question; that the mentalities of the [illegible] recorded on that day was procured by duress and undue influence, by [illegible] threatening to [illegible] relationship [illegible]. Morrow had for a long period of time been kept under the influence of morphine to [illegible] of his physical condition, and that the [illegible] modification of [illegible] 28th, was void and of no force or effect.

The question presented by this appeal is one of fact. The agreement of May 28th was executed by Mr. Morrow by his mark, and attested by W.M. Murphy, who was the real estate agent interested in the sale and purchase of the farm in question; and by Mary Dorfman, who was employed in the household of Mr. Morrow during the last two weeks of his illness; and by his attorney who had drawn the attested will on May 27th and who was present and saw the execution of the will. The attorney was not acquainted with Mr. Morrow.

It appears that the decedent, prior to his affliction, was actively engaged in the practice of law; that he was a man weighing in the neighborhood of one hundred seventy pounds, and that prior to his death he had become emaciated until he weighed but about seventy-five or

eighty pounds. The only thing administered to him over the period of his illness w as morphine. As the disease progressed, the amounts of morphine necessary to afford him relief, had to be increased until the average dose was one grain, administered as needed, either by Warren Horgan or his wife. He had not been able to take any nourishment during the last two weeks prior to his death. During this time he was kept under the influence of morphine. It is common experience that cancer is a steadily progressive disease, attended with great pain in the last stages. Also, that the continuous use of morphine over a prolonged period, especially with a person who is beset with pain and disease and who has reached the state of extremis, produces a situation where the individual's powers of mental coordination are impaired and his powers of inhibition are rendered unstable. One kept under the influence of morphine over a long and continuous time, reaches a mental state whereby he may be easily induced or persuaded by those standing in close relationship or by those charged with the administration of the drug.

The evidence in this case has been carefully examined. We do not consider a further discussion thereof would serve any good purpose. In our opinion the decree of the trial court is erroneous and the same is hereby reversed and this cause remanded with directions to dismiss the bill of complaint for want of equity.

Reversed and remanded with directions.

elderly people. The more likely explanation is his over-the period of his illness w as short-lived. As the illness progressed, the amounts of morphine necessary to afford his relief, had to be increased until the average dose was one-grain, administered by mouth, either by tablet form or his wife. He had not been able to take his accustomed meal during the last one week prior to his death. During that time he was kept under the influence of morphine. It is common knowledge that cancer is a painfully progressive disease, attended with great pain in the last stages. Also, that the conditions are of a nature over a prolonged period, essential also to proper care in cases with pain and disease and the medical profession can testify of authority, provide a situation where the individual's power of work is considerably impaired and the power of judgment is reduced to a minimum. The fact under the influence of morphine over a long and continuous time, reduces a mental state whereby no man is capable thereon or persuaded by those assuming in close relationship or by those charged with the administration of the drug.

The evidence in this case has been carefully considered. It is not essential a further discussion thereof would serve any good purpose. In our opinion the decree of the trial court is erroneous and the case is hereby reversed and it is hence remanded with directions to strike the bill of complaint for want of equity.

Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9359 & 9360

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On APR 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9359 Ag. No. 34

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1938

Frank Zimmer, Administrator of the Estate of Joseph Zimmer, deceased, Plaintiff and Appellee, vs. Chance S. Hill, Defendant and Appellant	No. 9359 Appeal from Circuit Court, DuPage County.
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Chance S. Hill, Plaintiff and Appellant vs. John Dallner and Frank Zimmer, Administrator of the Estate of Joseph Zimmer, deceased, Defendants and Appellees	No. 9360 Appeal from Circuit Court, DuPage County

Said cause of Hill v. Dallner, et al., No. 9360, has been, by order of this Court, consolidated with Zimmer, Administrator, etc. v. Hill, No. 9359

WOLFE, J.

U.S. Highway No. 34 joins Ogden Avenue at the City of Chicago and the highway is known to persons residing near the highway in the vicinity west of Chicago as Ogden Avenue. Close to the village of Clarendon Hills, Ogden Avenue, a paved road with four lanes for traffic, each about ten feet wide, extends east and west. Entering Ogden Avenue from Clarendon Hills is Coe Road which is about twenty feet wide and paved with tarvia or some similar material. Coe Road is a side road which enters Ogden Avenue on the south, but it does not continue north of it. On September 1, 1936, a few minutes before noon, Chance S. Hill was driving his DeSoto automobile eastward on Ogden Avenue toward Coe Road. At the same time Joseph Zimmer, an employee of John Dallner, was driving the Ford truck of his employer while engaged in delivering ice to the customers

IN THE
CIRCUIT COURT OF CUYAHOGA
COUNTY, OHIO AT
CLEVELAND, OHIO, A. D. 1920

Frank Glover, administrator of the
Estate of Edwin Glover, deceased,
Plaintiff and appellee,

vs.

George E. Hill,
Defendant and appellant

- - - -

Spence E. Hill,
Plaintiff and appellant

vs.

John Dellner and Frank Hagen,
administrator of the Estate of
Joseph Glover, deceased,
Defendants and appellees

Said cause of Hill v. Dellner, et al., No. 8239, Frank, Ex
rator of Edwin Glover, consolidated with Glover, Administrator,
etc. v. Hill, No. 8239

OPINION, J.

D.S. Richard Co. Pl Johns Ogden Avenue at the City of Cleveland and the highway is level so motorists reaching near the highway in the vicinity meet of motorists on Ogden Avenue. Close to the village of Glenwood Hills, Ogden Avenue, a paved road with four lanes for traffic, each about ten feet wide, extends east and west. Beyond Ogden Avenue from Glenwood Hills is Joe road which is about twenty feet wide and paved with brick or some similar material. Joe road is a side road which enters Ogden Avenue on the south, but it does not continue north of it. On September 1, 1920, a few minutes before noon, George E. Hill was driving his Dodge automobile westward on Ogden Avenue toward Joe Road. At the same time Joseph Glover, an employee of John Dellner, was driving the Ford truck of his employer while engaged in delivering ice to the customers

of Dallner. At Ogden Avenue near the junction of the two roads, the motor vehicles collided. It is not disputed that Zimmer drove the truck onto Ogden Avenue from Coe Road. As a result of the collision, Hill sustained a broken leg, both vehicles were damaged, Joseph Zimmer was stunned and died about two hours after the accident without regaining consciousness. There was no passenger in either vehicle, excepting Hill and the decedent, Zimmer, and there were no eye witnesses to the accident.

In the Circuit Court of DuPage County, Hill filed a complaint against John Dallner to recover damages for injuries to his person and automobile as a result of the collision, alleging that the collision was caused by the negligence of Dallner's servant, Joseph Zimmer. Later, he filed an amended complaint making Frank Zimmer as administrator of the estate of Joseph Zimmer, deceased, also a party defendant and sought to recover damages from Dallner and the estate of Joseph Zimmer. John Dallner filed a counterclaim to the amended complaint to recover the value of his truck, alleging negligence by Hill. Subsequently, the administrator, in the same court, filed a complaint against Hill to recover damages for the death of Joseph Zimmer, alleging negligence on the part of Hill.

The two suits were tried together and both were to abide the verdicts of the jury and the judgments of the court thereon. After the conclusion of the evidence, Dallner withdrew his counterclaim. The jury found Hill guilty and fixed the damages for the death of Zimmer at $6,000.00, and judgment was entered on the verdict in the suit of the administrator, against Hill. In the suit of Hill against Dallner and the administrator, a verdict of not guilty was returned and appropriate judgment rendered thereon. Hill has appealed in both suits and the administrator and Dallner appear here as appellees. There has been filed in this court one report of proceedings at the trial, and the appeals for review have been joined by this court at the request of the parties to the two suits.

At the trial, the court determined that Hill had the right to open and close the case and this procedure was adopted by the parties.

of Dallner. At about seven near the junction of the two roads, the motor vehicles collided. It is not disputed that Elmer drove the truck onto Ogden Avenue from Oak Road. As a result of the collision, Bill sustained a broken leg, both vehicles were damaged, Joseph Elmer was stunned and died about ten hours after the collision without regaining consciousness. There was no witness to actual vehicle, neither Bill nor the deceased, Elmer, and there were no eye-witnesses to the accident.

In the circuit court of Lake County, Bill filed a complaint against John Dallner to recover damages for injuries on his person and automobile as a result of the collision, alleging that the collision was caused by the negligence of Dallner's servant, Joseph Elmer. Later, he filed an amended complaint against Frank Elmer as administrator of the estate of Joseph Elmer, deceased, this party defendant was joined to recover damages from Dallner and the estate of Joseph Elmer. John Dallner filed a counterclaim to the amended complaint to recover the value of his car, alleging negligence of Bill. Subsequently, the administrator, in the same court, filed a complaint against Bill to recover damages for the death of Joseph Elmer, alleging negligence on the part of Bill.

The two suits were tried together and both were in which the verdicts of the jury and the judgments of the court thereon. After the conclusion of the evidence, Dallner withdrew his counterclaim. The jury found Bill guilty and fixed the damages for the death of Elmer at $4,000.00, and Dallner was entitled to the verdict in the suit of the administrator, against Bill. In the suit of Bill against Dallner and the administrator, a verdict of not guilty was returned and appropriate judgment rendered thereon. Bill has appealed in both suits and the administrator and Dallner asserts here as appellees. There has been filed in this court a report of proceedings at the trial, and the appeals for review have been joined by this court at the request of the parties to the two suits.

At the trial, the court determined that Bill had the right to open and close the case and this procedure was adopted by the parties.

It therefore became incumbent on Hill to maintain the cause of action stated in his amended complaint, to prove by a preponderance of the evidence that Joseph Zimmer was guilty of actionable negligence and himself free of contributory negligence. On the question of contributory negligence by Hill, it is argued on his behalf, that Joseph Zimmer was guilty of wilful and wanton misconduct at and before the time of the accident. The question of Zimmer's contributory negligence, on the contention that he was guilty of wilful misconduct, came up on motions made by the administrator and Dallner at the close of Hill's evidence for a directed verdict.

In the first count of Hill's complaint, in paragraph 6 thereof, it is charged in subparagraphs as herein designated, that Zimmer did one or more of the following acts--"carelessly and negligently: (a) operated said truck so that it collided with the automobile of Hill; (b) operated said truck into said intersection at a high, dangerous and excessive rate of speed; (c) proceeded without keeping a reasonably careful lookout and (d) failed to stop and give the right of way to the automobile of Hill; (e) proceeded while the view of the intersection was obstructed by elevated grounds and embankments, and without giving any warning or any reasonable notice of his intention to enter said intersection; (f) without having said truck equipped with brakes adequate to stop the same." By the second count, the several acts of commission and omission charged in the first count, are alleged to have been wilfully and wantonly committed.

Extending in both directions at Coe Road, Ogden Avenue is a straight highway for some distance. A viaduct conveying State Highway No. 54 over Ogden Avenue, is about two blocks east of Coe Road. From a point west of Coe Road, Ogden Avenue slopes eastward toward the viaduct. It is conceded by the parties that the driver of an automobile stopping near, or at the outlet of Coe Road into Ogden Avenue, could see a car approaching Coe Road on Ogden Avenue from

It therefore became incumbent on Hill to establish the course of action stated in his amended complaint, to prove by a preponderance of the evidence that George Emery was guilty of actionable negligence and himself free of contributory negligence. On the question of contributory negligence by Hill, it is urged in his behalf, that George Emery was guilty of wilful and wanton misconduct at and before the time of the accident. The question of Emery's contributory negligence, or the contention that he was guilty of wilful misconduct, came up on motions made by the administrator and Kellner at the close of Hill's evidence for a directed verdict.

In the first count of Hill's complaint, as amended & alleged, it is charged in subparagraphs, as direct negligence, that Emery did one or more of the following acts--carelessly and negligently: (a) operated said truck so that it collided with the automobile of Hill; (b) operated said truck into said intersection at a high, dangerous and excessive rate of speed; (c) proceeded without keeping a reasonably careful lookout and (d) failed to stop and give the right of way to the automobile of Hill; (e) proceeded while the view of the intersection was obstructed by elevated guards and embankments, and without giving any warning or any reasonable notice of his intention to enter said intersection; (f) without having said truck equipped with brakes adequate to stop the same." By the second count, the several acts of commission and omission charged in the first count, are alleged to have been wilfully and wantonly committed.

Extending in both directions at Coe Road, Ogden Avenue is a straight highway for some distance. A viaduct conveying State Highway No. 34 over Ogden Avenue, is about two blocks west of Coe Road. From a point west of Coe Road, Ogden Avenue slopes westward toward the viaduct. It is conceded by the parties that the driver of an automobile stopping near, or at the outlet of Coe Road into Ogden Avenue, could see a car approaching Coe Road on Ogden Avenue from

the west for a distance of 516 feet to the crest of a hill there in Ogden Avenue. It is stipulated by the parties that there was a stop sign approximately fifteen feet south of the concrete on Ogden Avenue and about six feet east of the improved part of Coe Road; that there was a slow sign immediately south of the concrete on Ogden Avenue about 300 feet west of Coe Road, and another one west of that a distance of about 800 feet from Coe Road. At the time of the collision, Emery Strauley and Harold Ankley, two employees of the Western Gas & Electric Co., were riding in a truck of their employer, driven southward on Highway No. 54 by Ankley toward the viaduct, and they were about a half block north of Ogden Avenue at the time of the impact of the two motor vehicles.

Strauley testified that Hill's car, after the collision, was about thirty feet in a field north of Ogden Avenue and it was facing north. He further testified substantially as follows: "I saw a cloud of smoke rising from Coe Road and Ogden Avenue which looked like it came from about the center of Ogden Avenue. I next saw a car coming out of this smoke going north. I saw the truck after the smoke cleared up. The accident was over after I saw the smoke and the car go into the ditch, through the fence north of Ogden Avenue. I drove to the place of the accident. The body of the truck was separated from the chassis. The body of the truck was a little west of Coe Road and in the second lane from the south in Ogden Avenue. The chassis was facing northeasterly, the back end nearly opposite the center of Coe Road; I would say that more of the chassis was north of the center line than south of it, part in the third and part in the second lane from the south in Ogden Avenue. Joseph Zimmer was lying in the center lane from the south in Ogden Avenue. There was an electric light pole there opposite Coe Road. The shoulder on the north side of Ogden Avenue is level with the road for about seven feet and then drops to the prairie or field. Below the shoulder is a fence. The car just missed the pole and went through the fence; I saw no scrape marks on the pole. Hill was in his car after the accident and Ankley

the west for a distance of 150 feet by the crack of a 12" trunk on Ogden Avenue. It is situated by the position that there was a tree approximately fifteen feet south of the property line, leaving and about six feet east of the improved part of the north side. There was a pine stump well east of the concrete in which trunk about 800 feet west of the tree, and another one west of that a distance of about 600 feet from the tree. In the line of the middle, Henry Strunk, and Harold Jolly, the employees of the Commonwealth Electric Co., were riding in a truck, of their employer, going westward on Ogden Ave. At that time I was driving my car, I first saw about a half block south of Ogden Avenue on the side of the street the two motor vehicles.

Strunk testified that Jolly said, "Look the motorist, was about thirty feet in a field south of Ogden Avenue and in the Jackson Park. He further testified substantially as follows: "I saw a cloud of smoke rising from the tree and then smoke which looked like it came from about the center of Ogden Avenue. I went and a car coming out of this block with high speed. I saw the smoke clearing up. The engine was over after I saw the smoke and the car in the ditch, through the trees south of Ogden Avenue. I drove to the place of the accident. The body of the street car separated from the chassis. The body of the truck was a little west of the road and in the second line from the south in Ogden Avenue. The chassis was facing northeasterly, the axle and nearly opposite the center of the Park; I would say that more of the chassis was north of the center line than south of it, part in the ditch and part in the second line from the south in Ogden Avenue. Joseph Turner was living in the center line from the south in Ogden Avenue. There was an electric light pole there opposite Doe Road. The sidewalk on the north side of Ogden Avenue is level with the road for about seven feet and then drops to the parkway or field. Below the sidewalk is a fence. The car just grazed the pole and went through the fence; I saw no scratch on the pole. Hill was in his car after the accident and Jolly

and I took him out of the car and laid him on the ground." Ankley, excepting that he could not say that the 'puff of smoke' came from the middle of Ogden Avenue, testified to the same effect as Strauley. John Hartman, a policeman of the Village of Hinsdale, arrived at the place of the accident a short time after it happened. He testified as to the positions of the body of the truck and the chassis on Ogden Avenue substantially as did Strauley and Ankley.

Dr. Robert Johnson, who drove his car over the crest of the hill west of Coe Road, almost immediately after the collision, testified that the body of the truck, the chassis and Zimmer were in the north part of the center line of Ogden Avenue and, to the best of his recollection, about opposite Coe Road. He further testified that there were tire marks on the south side of Ogden Avenue beginning west of Coe Road and running some fifty or sixty feet diagonally to the northeast and ending in a pile of dust and debris on the north side of Ogden Avenue. A witness testified, that after the accident, part of the chassis was in the third lane from the south and part in the second lane from the south; the body of the truck was lying in the third lane from the south; that the chassis was east and the body of the truck west of the travelled part of Coe Road. There was also testimony to the effect, that a few days after the accident, the brakes of the truck were examined and it was discovered that the brake lining, or band, over the drum of the right rear wheel was worn off so that there would be a metal to metal contact of the brake and the drum of that wheel when the brakes were applied; that if the brakes of an automobile were properly adjusted good "brakeage," could be obtained although the brake linings were badly worn or off. Several witnesses testified that Hill was a careful drive. This concluded the testimony introduced by Hill so far as material to the issue now under consideration.

At this stage of the trial, Dallner and the administrator made their separate motions for a directed verdict as to the second count of Hill's complaint. The motions were sustained. It is argued by

and I took his out of his car and left it [illegible]. I think, something that he could see not [illegible] 'half of about' [illegible] the middle of Duke Avenue, [illegible] to the [illegible] Duke Avenue, a [illegible] of the [illegible], [illegible] place of the accident [illegible] [illegible] as the position of the car [illegible] [illegible] Avenue [illegible] [illegible].

Dr. Robert Fonner, who drove his car [illegible] [illegible] west of Cox Ave, almost immediately after the collision, testified that the car of the truck, the [illegible] [illegible] were in the [illegible] part of the center line of Duke Avenue and, to the west of the intersection, about opposite Cox Road. He further stated that there was tire marks on the south side of Duke Avenue [illegible] [illegible] Cox Road and running some fifty or sixty feet diagonally to the northwest and ending in a pile of dust and debris in the north side of Duke Avenue. A witness testified, that after the accident, part of the chassis was in the third lane from the south and part in the second lane from the north; the cab of the truck was lying in the third lane from the north; that the chassis was bent and the cab at the front end of the travelled part of Cox Road. There was also testimony to the effect, that a few days after the accident, the brakes of the truck were examined and it was discovered that the brake lining, or band, over the drum of the right rear wheel was worn off so that there would be a metal to metal contact of the brake and the drum of that wheel when the brakes were applied; that if the brakes on an automobile were properly adjusted a good "emergency" could be obtained although the brake linings were badly worn or oil. Several witnesses testified that oil was a material factor. This concluded the testimony introduced by Hill as far as related to the issue now under consideration.

At this stage of the trial, Dallmar and the administrator made their separate motions for a directed verdict as to the second count of Hill's complaint. The motions were sustained. It is argued by

Hill that the court erred in sustaining these motions.

It is not disputed by the parties that Zimmer drove the truck into Ogden Avenue from Coe Road, or that Hill at the same time, drove his car toward Coe Road on Ogden Avenue. The evidence introduced by Hill proved the positions of Zimmer, the body and the chassis of the truck on Ogden Avenue after the accident. The length, course and termination of the tire marks made by Hill's car, after its brakes were applied, were also proven. The reasonable inference may be drawn from these facts, that the motor vehicles violently collided in Ogden Avenue, near the junction of the two roads. These circumstances are not proof of facts from which the inference or conclusion may be reasonably drawn that Zimmer was guilty of wilful misconduct, as charged in Hill's complaint. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be deduced from them, to show that Zimmer was guilty of wilful misconduct. We do not think that it can be fairly said that because of the positions of the motor vehicles and body of Zimmer on Ogden Avenue after the accident, the course of the tire marks, and the further fact that there was a violent collision of the vehicles, are sufficient proof of facts from which the inference can be legitimately drawn that Zimmer before, or at the time of the accident, was guilty of wilful misconduct. Should it be admitted that as a resonable inference to be drawn from the evidence, that Zimmer did not stop the truck before entering Ogden Avenue, and thereby violated the law, it is not a legal conclusion, because he violated the law, that he was guilty of wilful misconduct. Browne v. Siegel, 191 Ill. 226; P.C. C. & St.L. Ry. Co., v. Kinare, 203 Ill. 388; Streeter v. Humrichouse, 357 Ill. 234; Cook v. Big Muddy Mining Co., 249 Ill. 41. There is no proof that Zimmer was guilty of a wilful failure to stop the truck before entering Ogden Avenue. A conscious act or neglect is wilful, although there is no evil intent, but wilfulness implies something more than a mere failure to exercise ordinary care. There

will that the owner meant to substitute lawful relations.

It is not changed or the driver then changed from the lawful into Odum owned from Pa and, [illegible] drove his car toward the bar to cause damage. The evidence indicates or will prove the position of Odum. [illegible] charge of the team to cause damage after the accident. In legal, there are [illegible] of the [illegible] or truth car, after its driver was killed, went also drunk. The insurable interests may be from these facts, that [illegible] violently collided in Odum venue, but the [illegible] in his own [illegible]. These circumstances are not proof of facts from which the inference or conclusion may be reasonably drawn that there was malice or willful misconduct, as charged in [illegible]. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be deduced from them, so that the finder was guilty of willful misconduct. We do not think that it can be fairly said that because of the positions of the motor vehicles and Judy at Odum Avenue after the collision, the source of the bite mark, and the fact that there was a violent collision of the vehicles, are sufficient grant of facts from which the inference can be legitimately drawn that Odum before, or at the time of the accident, was guilty of willful misconduct. Should it be admitted that as a reasonable inference to be drawn from the evidence, that Odum did not stop the truck before entering Cedar Avenue, and thereby violated the law, it is not a legal conclusion, because he violated the law, that he was guilty of willful misconduct. Crowe v. Hagel, 193 Ill. App. 5; P.C. T. & Sc.L. Ry. Co., v. Kimes, 202 Ill. 379; Brewster v. Tuckerman, 207 Ill. 274; Ford v. Big Muddy Mining Co., 240 Ill. 41. There is no proof that Odum was guilty of a willful failure to stop the truck before entering Cedar Avenue. A consideration of the evidence is willful, although there is no evil intent, but wilfulness implies something more than a mere failure to exercise ordinary care. There

is a clear distinction between a negligent omission and wilful failure to act, and wilfulness and negligence have always been recognized as the opposites of each other-- Cook v. Big Muddy Mining Co., supra. There must be facts proved from which the legitimate inference may be drawn, that the person charged with wilful misconduct has committed or omitted some act or acts bringing his conduct within the legal definition of wilful misconduct. Cook v. Big Muddy Mining Co., supra; I.C.R.R. Co. v. Leiner, 202 Ill. 624. It is a matter of conjecture, as the evidence stood at the close of Hill's evidence, that Zimmer approached the intersection at a dangerous rate of speed, or so rapidly that he was unable to stop the truck before entering Ogden Avenue. There is no proof that the defective brakes on the truck, (accepting as true the evidence to the effect that they were defective) proximately contributed to the collision (Cook v. Big Muddy Mining Co., supra.) The trial court did not err in directing a verdict for Dallner and the administrator at the close of Hill's evidence, under the second count of Hill's complaint charging wilful misconduct.

Also at the conclusion of Hill's evidence, the defendants, Dallner and the administrator made motions to strike sub-paragraphs (b), (d) and (e) of paragraph six of the first count of Hill's complaint. The motions were allowed. Hill's case was ultimately submitted to the jury on the allegations of negligence, stated in his complaint, that Zimmer carelessly and negligently: (a) operated the truck so that it collided with the automobile of Hill; (c) proceeded without keeping a reasonably careful lookout, and (f) without having said truck equipped with brakes adequate to stop the same. As above stated, at the conclusion of all the evidence, both on behalf of the plaintiff and the defendants, the jury returned a verdict of not guilty on those charges. It is contended that that verdict is against the manifest weight of the evidence. It is also contended that the verdict against Hill in the suit of the administrator, is against the manifest weight of the evidence. A determination of these contentions will be deferred until all the evidence in the case may be considered.

is a clear distinction between a negligent omission and either failure to act, and authorities and decisions [illegible] accordingly to the opposites of each other--[illegible]. [illegible]. There must be facts proven from which the [illegible] may be inferred, that the person charged with [illegible] was prohibited or omitted from act to make [illegible] of which [illegible]. [illegible]; [illegible]. Co. v. Dolan, 208 Ill. 628. If it is a matter of [illegible], or the evidence rests at the close of Gill's evidence, that [illegible] the intermission of a [illegible] or to [illegible] that he was unable to stop the train before [illegible]. There is no proof that the defendant [illegible] the [illegible], [illegible] the evidence to the effect that they [illegible] contributed to the collision (Ind v. [illegible] [illegible], supra.) The trial court did not err in directing a verdict for Dalter and the administrator at the close of Gill's evidence, under the record count of Gill's complaint [illegible] [illegible].

Also at the conclusion of Gill's evidence, the defendants, Dalter and the administrator made motions to strike counts [illegible] (b), (d) and (e) of paragraph six of the first count of Gill's complaint. The motions were allowed. Gill's [illegible] dismissed; submitted to the jury on the allegations of negligence, stated in his complaint, that Dalter carelessly and negligently: (1) operated the truck so that it collided with the automobile of Gill; (2) proceeded without keeping a reasonably careful lookout, and (3) without ever having said truck equipped with brakes adequate to stop the same. As above stated, at the conclusion of all the evidence, both on behalf of the plaintiff and the defendants, the jury returned a verdict of not guilty as to some counts. It is contended that that verdict is against the manifest weight of the evidence. It is also contended that the verdict against Gill in the suit of the administrator, is against the manifest weight of the evidence. A determination of these contentions will be deferred until all the evidence in the case may be considered.

The trial then proceeded by the defendants, Dallner and the Administrator, introducing evidence to sustain the counterclaim of Dallner and the complaint of the Administrator. It was incumbent on the Administrator to maintain the cause of action stated in his complaint against Hill, to prove by a preponderance of the evidence, that Hill, at, or before the collision, was guilty of actionable negligence and his intestate free of contributory negligence, before and at the time of the accident.

The first count of the administrator's complaint charges that Hill carelessly and negligently: "(a) operated his automobile so that it ran into the truck of the deceased; (b) and operated it at a high and dangerous rate of speed (c) without keeping a reasonable lookout ahead, (d) failed to decrease the speed of his automobile as he was approaching said intersection, (e) and carelessly and negligently failed to drive said automobile on the right half of said highway, but on the contrary, drove the same on the left half thereof, contrary to and in violation of the provisions of Section 54 of Article VII of the Uniform Act Regulating Traffic on Highways of the State of Illinois, and thereby cause said automobile to run upon and against and come in violent contact and collision with the motor truck of the deceased; (f) and carelessly and negligently failed to pass to the right of the motor truck of the deceased." By the second count of the complaint the acts of omission and commission, charged in the first count, are alleged to have been committed wilfully and wantonly.

Evidence was introduced by Dallner that about a week before the collision, the brakes of the truck were adjusted; that the brake bands were in good condition and the car given a trial run to test the brakes and that they were in good working order. After the introduction of evidence, to prove that the brake bands of the truck were in the same condition as they were directly after the collision, and at the time of the trial, the brake bands were introduced in evidence. In the suit of Hill against the defendants, Dallner and the Administrator, it cannot be fairly

The trial was presided by his Honour, Judge [illegible] Administrator, introducing evidence to sustain the [illegible] Dillner was the complaint of the Administrator. It was [illegible] on the Administrator to establish the [illegible] complained against (iii), to prove by a preponderance of the evidence that [illegible], in defiance the [illegible], was guilty of [illegible] negligence and its increase [illegible] Administrator, therefore and at the time of the accident.

The first count of the Administrator's complaint [illegible] fill correctly and negligently: (a) operated its automobile so that it ran into the rear of the deceased; (b) and operated it at a high and dangerous rate of speed (c) without keeping a reasonable lookout ahead, (d) failed to decrease the speed of its automobile as to avoid approaching said intersection, (e) and carelessly and negligently failed to drive said automobile on the right half of said highway, but on the contrary, drove the same on the left half thereof, contrary to and in violation of the provisions of section 55 of Article VII of the Civil Code relating traffic on highways of the State of Illinois, and thereby [illegible] said automobile to run and [illegible] and come in violent contact and collision with the motor truck of the deceased; (f) and carelessly and negligently failed to pass to the right of the motor truck of the deceased." By the second count of the complaint the acts of omission and commission, charged in the first count, are alleged to have been committed wilfully and wantonly.

Evidence was introduced by Dillner that about a week before the collision, the brakes of the truck were adjusted; that the brake bands were in good condition and the car driven a trial run to test the brakes and that they were in good working order. After the introduction of evidence, to prove that the brake bands of the truck were in the same condition as they were directly after the collision, and at the time of the trial, the brake bands were introduced in evidence. In the suit of Will against the defendants, Dillner and the Administrator, it cannot be fairly

said that the verdict of the jury is against the manifest weight of the evidence on the question whether the truck was, at the time of the accident, equipped with adequate brakes.

Witnesses testified that after the collision, the Hill car was in the field about thirty feet north of Ogden Avenue, almost opposite Coe Road. That the tire marks, about sixty feet long, starting from the south lane of Ogden Avenue, extended in a north--easterly direction to the third lane on the north side of the avenue and that they ended about thirty-five feet west of Coe Road; that there was oil where the marks end; that the truck chassis was about thirty feet east of Coe Road lying on the shoulder north of Ogden Avenue; the body of the truck was west of Coe Road about forty feet and off the shoulder north of Ogden Avenue.

Evidence was introduced to prove the habits of the decedent, Joseph Zimmer, as a careful driver, to which there was no objection by Hill, excepting as hereinafter stated.

The attorney for the administrator offered to read to the jury a portion of the testimony of Hill, at the inquest over the body of Joseph Zimmer. The offer was objected to by Hill's attorneys as not impeachment or proper. Upon the statement being made by counsel for the administrator, that the offer was not made for the purpose of impeachment, but as admissions of Hill at the time the inquest was held, defendants were permitted to read portions of Hill's testimony given before the coroner. This was done over the renewed objection of counsel for Hill. It is argued by counsel for Hill that this was error by the trial court. We do not concur with this contention. Hill was a party to the suit. He testified voluntarily before the coroner, after being informed that he could claim his legal right not to testify. He stated that he wanted to testify. (Lyons v. The People, 137 Ill. 602; Merchants' Loan & Trust Co. v. Egan 222 Ill. 494; Carroll v. Kraus 295 App. 552.) The portions of Hill's testimony before the coroner and read to the

said that the verdict of the jury is against the weight of the evidence on the question whether the driver was, at the time of the accident, equipped with adequate brakes.

Plaintiff contended that after the evidence . . . was in the trial court twenty feet north of Arden Avenue, almost opposite Oak Road. That the car came, around a long left curve, starting from the south line of Oakes Avenue, approaching in a northeasterly direction to the third line on the north side of the avenue and then they ended about thirty-five feet west of the south; that there was oil above the entire end; that the car, coming on about thirty feet east of the south line on the westbound side of Arden Avenue; the body of the truck was west of the line about four feet and off the shoulder north of Arden Avenue.

Evidence was introduced to prove the damage of the plaintiff, Joseph Cimmer, as a result of the accident, to which there was no objection by Hill, according as hereinafter stated.

The attorney for the plaintiff offered to read to the jury a portion of the testimony of Hill, at the inquest over the body of Joseph Cimmer. The offer was objected to by Hill's attorney as not impeachment or proper. Upon the statement being made by counsel for the defendant, that the offer was not made for the purpose of impeachment, but as admissions of Hill at the time the inquest was held, defendants were permitted to read portions of Hill's testimony given before the coroner. This was done over the renewed objection of counsel for Hill. It is argued by counsel for Hill that this was error by the trial court. We do not agree with this contention. Hill was a party to the suit. He testified voluntarily before the coroner, after duly informed that he could claim his legal right not to testify. He stated that he wanted to testify. (Lyons v. The People, 177 Ill. 502; Fernandez' Case 2 Ill. Dec. v. Appt. 252 Ill. 494; Darroll v. Trans 247 App. 552.) The portions of Hill's testimony before the coroner was read to the

jury, appear in the abstract of the record filed in this court.

Evidence was introduced to prove that Hill drove his car at a fast rate of speed in urban sections and that he did not always obey stop signs while driving his car.

At the close of all the evidence, Hill made a motion for a directed verdict on charges of the first count of the administrator's complaint. The motion was overruled. Thereupon, Hill made separate motions for a directed verdict on the charges of the administrator's complaint designed a, b, d, e and f. The motions were overruled excepting on charges d and f and the jury was instructed to find Hill not guilty on the charges d and f. It is assigned as error by Hill that the court erred in overruling his motion for a directed verdict on the charge e of the administrator's complaint. Upon the request of Hill there was given an instruction to the jury to find Hill not guilty on the second count of the administrator's complaint, which charges wilful and wanton misconduct.

On the question that the verdict finding Dallner and the administrator not guilty of the charges alleged in Hill's complaint is against the manifest weight of the evidence, it is urged that the evidence shows manifestly and conclusively that Joseph Zimmer, the truck driver, was guilty of wilful misconduct and therefore an action by his administrator is barred, although conceding, for the sake of argument, that there is evidence in the record tending to prove actionable negligence by Hill. For the reasons already stated in this opinion, the contention cannot be considered. On the point that the verdict is against the manifest weight of the evidence, it is also argued that there is nothing in the record proving Hill guilty of actionable negligence. Unless it can be said as a matter of law that there is no evidence, including legitimate inferences to be drawn therefrom, proving the negligence of Hill, or proving freedom of contributory negligence by Joseph Zimmer, it is our opinion that it cannot be said that there is a manifest weight of the evidence favoring either party to the two suits.

jury, appear in the instance of the second count in this record.

Evidence was introduced to prove that Gill drove his car at a fast rate of speed in urban sections and that he did not always obey stop signs while driving his car.

In the place of all the evidence, Gill made a motion for a directed verdict on behalf of the first count of the indictment-- tor's complaint. The motion was overruled. Thereafter, Gill made separate motions for a directed verdict on the charges in the administrator's complaint designated 1, 2, 3 and 4. The motions were overruled excepting as charges 3 and 4 which he was instructed to find Gill not guilty on the charges 3 and 4. He is charged in count 3 of Gill that his wife was killed by reason of his motion for a directed verdict on the charge 3 of the administrator's complaint. Upon the request of Gill there was given an instruction to the jury to find Gill not guilty on the second count of the administrator's complaint, which charges willful and wanton misconduct.

In the question that the counsel finding motion and the administrator not guilty of the charges filed in Gill's complaint is against the manifest weight of the evidence, it is urged that the evidence shows positively and conclusively that Joseph Gilmer, the truck driver, was guilty of willful misconduct and therefore a action by the administrator is barred, although conceding, for the sake of argument, that there is evidence in the record tending to prove actionable negligence by Gill. For the reasons given above in this opinion, the contention cannot be sustained. On the point that the verdict is against the manifest weight of the evidence, it is also argued that there is nothing in the second proviso Gill's guilty of actionable negligence. Unless it can be said as a matter of law that there is no evidence, including legitimate inferences to be drawn therefrom, proving the negligence of Gill, or proving freedom of contributory negligence by Joseph Gilmer, it is our opinion that it cannot be said that there is a manifest weight of the evidence favoring either party to the two suits.

The rate of speed at which Hill was driving his car before the collision, was proved. It was also proved that the tire marks of his car extended from the south side of Ogden Avenue in a northeasterly direction for a distance of about sixty to seventy feet and terminated on the north side of Ogden Avenue. Hill testified (athhe inquest) that as he approached Coe Road he was giving his attention to the overpass and slowing the speed of his car for the curve beyond the overpass. It is stipulated by the parties that the view on Ogden Avenue approaching Coe Road from the west was unobstructed for a distance of 513 feet. Whether Hill was negligent in not observing the truck and avoiding a collision, either while the truck was on Ogden Avenue, or at the outlet of Coe Road, we are of the opinion was a question of fact for the jury.(Blumb v. Getz, 366 Ill.273).

There was evidence introduced to prove that Joseph Zimmer was a careful driver. Whether he failed to stop at the junction of Coe Road and Ogden Avenue was a question for the jury. Casey v. Chicago Rys. Co., 269 Ill. 386; Petro v. Hinds, Director General of Railroads, 299 Ill. 236. If he failed to stop, the question of fact remained whether his failure to stop proximately contributed to the accident. Jeneary v. C. & I. Traction Co., 306 Ill. 392. The question of contributory negligence by Joseph Zimmer was a question of fact for the jury.

A witness by the name of George Bigler, called by the administrator to prove the habits of Joseph Zimmer as a careful driver, testified that he lived in Clarendon Hills; that the decedent delivered ice to his home for about two weeks before the accident; that he saw him drive the truck north on Coe toward Ogden Avenue five or six times. Over Hill's objection, he testified as follows: "He would approach Ogden Avenue, make a stop for Ogden Avenue, and then turn left and head west on Ogden." Joseph Zimmer had been delivering ice for Dallner about twelve days before the accident. This evidence of Bigler was incompetent. (Gray v. Chicago R.I.&P. Ry. Co., 143 Ia. 268, 121 N.W. 1097; Dalton v. Chicago etc., R.R.Co.

The rate of speed at which Gill was driving at the time of collision, was proved. It was also proved that the line of his car extended from the south side of Queen Avenue in a northerly direction for a distance of about ninety to ninety-two and terminated on the north side of Queen Avenue. Gill maintained (which judgment) that it is impossible for motorists to avoid collisions on the overpass and showing the speed of all cars for the entire length the overpass. It is unknown if an motorist had the view on Queen Avenue approaching the road from the east unobstructed for a distance of 500 feet. Neither Gill nor witnesses in not observing the truck, did exercise a condition, stated that the truck was on Cedar Avenue, or in the middle of the road; or not of the opinion was a reasonable or fair for the jury.(Hunt v. Cobb, 320 Ill.279).

There was evidence introduced to prove that Joseph Tanner was a careful driver. Failure to fulfill to show if the function of the road at upper Avenue was a question for the jury. Dunn v. Illinois Eye. Co., 290 Ill. 501; Peters v. Kuhn, Director General of Railroads, 290 Ill. 556. If so failed to stop, the question of fact involved whether his failure to stop constitutes contributory negligence. Thomas v. C. & I. Traction Co., 308 Ill. 79. The question of contributory negligence by Joseph Tanner was a question of fact for the jury.

A witness by the name of George Tilley, called by the defendant tender to prove the habits of Joseph Tanner as a careful driver, testified that he lived in Glenwood Ill; that he frequent delivered ice to Gill Dam for about two years before the accident; that he saw him drive the truck north on the Lincoln Cedar Avenue city of six times. Over Gill's objection, he testified as follows: "He would approach Cedar Avenue, make a stop for Queen Avenue, and then turn left and head west on Queen." Joseph Tanner had been delivering ice for Tilley about twelve days before the accident. This evidence of Tilley was incompetent. (Hoyt v. Chicago C.I.&E. Ry. Co., 140 Ill. 500, 141 E.R. 1077; Peters v. Chicago etc., R.R.Co.

114 Ia. 257, 86 N.W. 272; L. & N.R.R. Co., v. Taylor's Adm'r., 31 Ky. L. Rep. 1142, 104 S.W. 776; Wigmore on Evidence, Vol. 1, page 166 Sect. 99) It was argued to the jury by the attorneys for the defendants, Dallner and the administrator, that the inference could be drawn from the evidence of Bigler that Joseph Zimmer stopped the truck before entering Ogden Avenue from Coe Road before the accident. It is also the theory of said defendants that Joseph Zimmer, after entering Ogden Avenue, drove the truck on Ogden Avenue toward the west. The evidence was prejudicial to Hill.

It is also contended that the court erred in overruling Hill's motion for a directed verdict on c harge e of the administrator's complaint. There is no evidence proving, or tending to prove, that Hill negligently drove his car on the north half of Ogden Avenue before the accident.

It is also complained by Hill that the court erred in refusing him the right to testify, it being contended that he was a competent witness against the co-defendant, Dallner, although not a competent witness against the administrator under the Evidence Act. It is our opinion that he was not a competent witness, although Hill requested the Court to limit his testimony, as being against Dallner only. (Sullivan v. Corn Products Co., 245 Ill. 9; Ackman v. Potter, 239 Ill. 578, 582; Merchants' Loan & Trust Co. v. Egan, supra).

As before stated, it was incumbent on the administrator to maintain the charges of negligence contained in his complaint to prove Hill guilty of actionable negligence and his intestate before and at the time of the accident, free of contributory negligence. The question of the proof of both of these essential elements in the case of the administrator rests strongly on the theory that Joseph Zimmer stopped the truck at the outlet of Coe Road into Ogden Avenue and then proceeded to drive west on Ogden Avenue on the north side of Ogden Avenue where he was struck by Hill's car which was before the accident, being negligently and contrary to law driven on the north side of Ogden Avenue. It was the incompetent testimony of the

114 Ia. 527, 68 N.W. 792; L. & W.R.R. Co., v. Trefzger's Adm'r., 21 Ky. L. Rep. 1141, 104 S.W. 770; Sincere on Evidence, Vol. 1, page 160 Sect. 87) It was argued to the jury by the attorneys for the defendants, Hallmon and are administrator, that the i fendant might be given the evidence of Taylor that Joseph Simons stopped the truck before entering Logan Avenue from Oak Street before the accident. It is also the theory of said defendants that Joseph Simons, after entering Logan Avenue, drove the truck on Logan Avenue immediately west. The evidence was contradicted by Hill.

It is also contended that the court erred in excluding Hill's motion for a directed verdict on a large _p_ of the defendant's counsel. There is no evidence proving, or tending to prove, that Hill negligently drove his car on the north half of Logan Avenue before the accident.

It is also contended by Hill that the court erred in refusing his right to testify, it being contended that he was a competent witness against the co-defendant, Hallmon, although not a competent witness against the administrator under the Wilkerson Act. It is our opinion that he was not a competent witness, although Hill requested the Court to limit his testimony, as being against Hallmon only. (Spillman v. Corn Products Co., 118 Ill. 3; Adkins v. Boyton, 189 Ill. 578, 588; Merchants' Loan & Trust Co. v. Sam, supra).

As before stated, it was incumbent on the administrator to establish the charges of negligence contained in the complaint to prove Hill guilty of actionable negligence and its intersects proximate and at the time of the accident, free of contributory negligence. The question of the proof of both of these essential elements in the case of the administrator rests strongly on the theory that Joseph Simons stopped the truck at the corner of the road into Logan Avenue and then proceeded to drive west on Logan Avenue to the north side of Logan Avenue where he was struck by Hill's car which was behind the accident, being negligently and contrary to law driven on the north side of Logan Avenue. It was the incompetent testimony of the

witness Bigler, which to an extent larger than any other element in the case, supports the above theory. It is also plain that Bigler's testimony was a strong link in the evidence offered by the defendants, Dallner and the administrator to the complaint of Hill, in their defense that Joseph Zimmer was in the exercise of due care for his own personal safety, before and at the time of the accident.

The judgment in the case of Frank Zimmer, a dministrator of the estate of Joseph Zimmer, deceased, against Chance S. Hill is reversed and remanded to the Circuit Court of DuPage County for a new trial. An order of similar import to the above is hereby ordered entered in the case of Chance S. Hill against John Dallner and Frank Zimmer, administrator of the estate of Joseph Zimmer, deceased.

Reversed and Remanded.

witness Tigler, which is no doubt larger than any other income in the case, supports the above finding. In it, the plaintiff Tigler's testimony was a strong link in the evidence offered by the defendants, Dolmer and the administrator of Mr. Langdon's will, in their defense that Joseph Timmer was in the exercise of due care for his own personal safety, before and at the time of the accident.

The judgment in the case of Paul Timmer, a minor, by guardian of the estate of Joseph Timmer, deceased, against Count 2. (1) is reversed and remanded to the Circuit Court of Lake County for a new trial. An order of similar import as to Count 1a hereby ordered entered in the case of Count 2. (1) against John Dolmer and Frank Dolmer, administrator of the estate of Joseph Timmer, deceased.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

Gen. No. 9397 Ag. No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1939.

Virginia Warren,
(Plaintiff) Appellee

vs.

City of Waukegan, a municipal corporation,
(Defendant) Appellant

Appeal from
Circuit Court,
Lake County.

WOLFE, J.

The plaintiff, Virginia Warren, started suit in the Circuit Court of Lake County against the City of Waukegan, for damages she alleges she sustained, when she alighted from an automobile and tripped and fell over a curb-box located between the curb and sidewalk in what is called a parkway in front of her home. The box protruded above the ground level about eight inches, and was four inches in width. The complaint is in the usual form and its sufficiency is not challenged in this appeal. The defendant filed its answer and denied any negligence on the part of the City in maintaining the curb-box in question, and denied all the material allegations of the complaint. The case was tried before a jury, which found the issues in favor of the plaintiff and assessed her damages at $1,000.00, for which judgment was entered.

The record discloses that the plaintiff had been riding with her husband and he stopped and parked his car in front of their home; it was dark; that as she got out of the car, she stepped into the parkway between the curb line and the sidewalk in front of her home and tripped and fell over the curb-box in question; that she was injured and suffered severe pain, and had a miscarriage of a six and one-half or seven months old child. The plaintiff and the doctor testified in detail, to the injuries in question, The appellant does not contend, in this appeal, that the verdict is contrary

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

FEBRUARY TERM, A.D. 1926.

Virginia Carter,
(plaintiff) appellee

vs.

City of Charleston, a municipal
corporation,
(defendant) appellant

Appeal from
Circuit Court,
Lake County.

WOLFE, J.

The plaintiff, Virginia Carter, brought suit in the Circuit Court of Lake County against the City of Charleston, for damages she alleges she sustained, when she tripped over an embankment and tripped and fell over a sewer-box located between the curb and sidewalk in what is called a parkway in front of her home. The box projected above the ground level about eight inches, and was four inches in width. The complaint is in the usual form and the sufficiency is not challenged in this appeal. The defendant filed its answer and denied any negligence on the part of the City in maintaining the curb-box in question, and denied all the material allegations of the complaint. The case was tried before a jury, which found the issues in favor of the plaintiff and assessed her damages at $1,000.00, for which judgment was entered.

The record discloses that the plaintiff had been visiting her husband and he stopped and parked his car in front of their home; it was dark; just as she got out of the car, she stepped into the parkway between the curb line and the sidewalk in front of her home and tripped and fell over the curb-box in question; that she was injured and suffered severe pain, and had a miscarriage of a six and one-half or seven months old child. The plaintiff and the doctor testified in behalf, to the injuries in question. The appellant does not contend, in this appeal, that the verdict is contrary

to the weight of the evidence, so a further discussion of the facts is unnecessary.

The first assignment of error is as follows: "The court erred in admitting evidence over objection of defendant which was highly prejudicial, on the promise of attorney for the plaintiff to connect the same, and further magnifying that error by its own motion to exclude the same after plaintiff's attorney had argued same to the jury." The appellee contends that the amount of the verdict, as shown by the evidence, is wholly inadequate. The appellant in its printed brief, states it is not contended by the defendant that the verdict is excessive, but rather that the verdict is not large enough, (being $1,000.00) thus indicating prejudice and passion of the jury. The evidence objected to by the defendant, was the second miscarriage of the plaintiff after the accident. Upon the statement of the attorney for the plaintiff, that he would connect up this evidence with the injury sustained in the accident, the court overruled the objection to the evidence. The attorney for the plaintiff failed to connect up the evidence as avowed. The court of its own motion, after the opening arguments had been made to the jury by plaintiff's attorney, struck out the evidence, and the jury was instructed to disregard it. It is not contended by either party to this litigation, that the court erred in s triking this evidence. The appellant contends that the testimony was highly prejudicial to them. The only effect that this evidence could have upon the jury, would be as to the size of their verdict, and the appellant insists that the verdict, as shown by the evidence, is insufficient for the injuries which the plaintiff sustained. While it was error to admit this testimony, the court corrected it, and it was not prejudicial to the rights of the defendant. The city argues the fact that it was not to blame, in any manner, for the accident. They failed to present this question to the court, and by their failure to assign error, that the verdict is against the weight of the evidence, they waived any question as to the City's liability, because of the verdict being contrary to the weight of the evidence.

to the weight of the evidence, so a further discussion of the facts is unnecessary.

The first assignment of error is as follows: "The court erred in admitting evidence over objection of defendant which was highly prejudicial; on the grounds of admissibility for the plaintiff to connect the acts, and further emphasizing such error by the court which in regards the same after plaintiff's attorney had argued same to the jury." The appellee contends that the amount of the verdict, as shown by the evidence, is wholly inadequate. The appellant in its printed brief, argues it is not contended by the defendant that the verdict is excessive, but rather that the verdict is not large enough, (being $1,000.00) thus indicating prejudice and passion of the jury. The evidence objected to by the defendant, was the second discussion of the plaintiff after his accident. Upon the statement of the attorney for the plaintiff, that he would connect up this evidence with the injury sustained in the accident, the court overruled the objection to the evidence. The attorney for the plaintiff failed to connect up the evidence as proposed. The court of its own motion, after the opening arguments had been made to the jury by plaintiff's attorney, struck out the evidence, and the jury was instructed to disregard it. It is not contended by either party to this litigation, that the court erred in striking this evidence. The appellant contends that the testimony was highly prejudicial to them. The only effect that this evidence could have upon the jury, would be as to the size of their verdict, and the appellant insists that the verdict, as shown by the evidence, is insufficient for the injuries which the plaintiff sustained. While it was error to admit this testimony, the court corrected it, and it was not prejudicial to the rights of the defendant. The city argues the fact that it was not to blame, in any manner, for the accident. They failed to present this question to the court, and by their failure to assign error, that the verdict is against the weight of the evidence, they waived any question as to the city's liability, because of the verdict being contrary to the weight of the evidence.

The second assignment of error is, "The court erred in refusing to admit evidence as to the number of other curb-boxes similar to this located within the City of Waukegan, as a basis of showing lack of exercise of ordinary care in crossing any parkway in the City without expecting such obstruction." Counsel for appellant cite three cases where proof of other accidents have been allowed to be admitted in evidence, as showing the dangerous conditions that existed at the time, and for the purpose of showing knowledge of that danger. In one case, Wibel vs. The Illinois Central Railroad Company 165 Ill. App. Page349, the Court stated, "The fact that the company was not accustomed to ballast its tracks at the places similar to the one in question, that the plaintiff sustained his injury, if it was a fact, would not excuse the company from ballasting its track at the place this injury occurred, if it was required to do so, in order to make it a reasonable safe track for the use of the employees." The evidence in the present case is uncontradicted, that the plaintiff did not know of the existence of the box in question, and whether she knew of any of the other boxes, was immaterial in this case. Our attention has not been called to any case where such evidence has been held to be admissible.

We find no reversible error in the case, and the judgment of the trial court will be affirmed.

Affirmed.

The second amendment of course is, "The court erred in refusing to admit evidence as to the number of other arc-lights similar to this located within the city of Anderson, as a basis of comparison of exercise of ordinary care in erecting and placing in the city without excluding such observation." Counsel for appellant also cites cases where proof of other accidents have been allowed to be admitted in evidence, as showing the dangerous conditions that existed at the time, and for the purpose of showing knowledge of that danger. In one case, Ohio vs. The Illinois Central Railroad Company 187 Ill. App. Page 249, the Court stated, "The fact that the company was not accustomed to haulint its trucks at the places similar to the one in question, that the plaintiff sustained his injury, if it was a fact, would not excuse the company from liability if the injury at the place this injury occurred, if it was required to do so, it could in such a reasonable way (such for the use of the employer." The evidence in the present case is uncontradicted, that the plaintiff did not know of the existence of the box in question, nor whether one been of any of the other kind, was installed in this city. Our attention has not been called to any case where such evidence has been held to be admissible.

We find no reversible error in the case, and the judgment of the trial court will be affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty- _____

_____
Clerk of the Appellate Court

9422

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On APR 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9422 Ag. No. 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1939

Delbert O. Waud, Evelyn Waud,
Fannye Brandstetter and Grace
Murphy,

(Plaintiffs) Appellees,

vs.

Maurice Van Landuyt,
(Defendant) Appellant.

Appeal from
Circuit Court,
Lake County

WOLFE, J.

Delbert O. Waud, Evelyn Waud, Fannye Brandstetter and Grace Murphy filed a complaint at law against Maurice Van Landuyt for damages alleged to have been sustained in a collision on April 16, 1938, between an automobile owned by Delbert O. Waud and operated by Evelyn Waud, and an automobile owned and operated by Maurice Van Landuyt. The complaint alleged that Fannye Brandstetter and Grace Murphy were passengers in a car owned by Delbert O. Waud, which was being driven by Evelyn Waud, north on Fulton Street near the intersection with Lloyd Avenue in Waukegan, Lake County, Illinois; that Maurice Van Landuyt drove his automobile west on Lloyd Avenue negligently and wilfully and without keeping a proper lookout for other people on said highway, and at an excessive rate of speed, and without proper brakes; that as a result of the negligence, or wilful and wanton misconduct of Van Landuyt, a collision occurred and Evelyn Waud, Fannye Brandstetter and Grace Murphy each sustained injuries and the automobile of Delbert O. Waud was damaged.

Maurice Van Landuyt filed his answer and denied all acts of negligence and wilful and wanton misconduct. He denied that the plaintiffs were in the exercise of due care and caution for their

Gen. No. 24422 No. 19

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

NOVEMBER TERM, A.D. 1929

Delbert O. Maud, Evelyn Maud,
Fannye Brandstetter and Grace
Murphy,

(Plaintiffs) Appellees,

Appeal from
Circuit Court,
Lake County

vs.

Maurice Van Landuyt,
(Defendant) Appellant.

WOLFE, J.

Delbert O. Maud, Evelyn Maud, Fannye Brandstetter and Grace Murphy filed a complaint at law against Maurice Van Landuyt for damages alleged to have been sustained in a collision on April 15, 1928, between an automobile owned by Delbert O. Maud and operated by Evelyn Maud, and an automobile owned and operated by Maurice Van Landuyt. The complaint alleged that Fannye Brandstetter and Grace Murphy were passengers in a car owned by Delbert O. Maud, which was being driven by Evelyn Maud, north on Sutton Street near the intersection with Lloyd Avenue in Waukegan, Lake County, Illinois; that Maurice Van Landuyt drove his automobile west on Lloyd Avenue negligently and wilfully and without keeping a proper lookout for other people on said highway, and at an excessive rate of speed, and without proper brakes; that as a result of the negligence, or wilful and wanton misconduct of Van Landuyt, a collision occurred and Evelyn Maud, Fannye Brandstetter and Grace Murphy each sustained injuries and the automobile of Delbert O. Maud was damaged.

Maurice Van Landuyt filed his answer and denied all acts of negligence and wilful and wanton misconduct. He denied that the plaintiffs were in the exercise of due care and caution for their

own safety, and denied any and all damage claimed by them. He affirmatively alleged that Evelyn Waud was guilty of wilful and wanton misconduct which caused the collision. Later, the charge of wilful and wanton misconduct of the complaint answers were dismissed. The case was tried before a jury who found the issues in favor of the plaintiffs and assessed their damages as follows: Evelyn Waud $200.00; Delbert O. Waud $247.50; Fannye Brandstetter $640.00 and Grace Murphy $4,500.00. Judgment was entered upon these various verdicts and it is from these judgments that this appeal is prosecuted.

At the close of plaintiffs' evidence and also at the close of all the evidence, the defendant entered a motion for a directed verdict. He claimed there was no evidence to sustain the plaintiffs' case and that the defendant was not guilty of any negligence which proximately contributed to the accident in question. The overruling of this motion is the chief contention of the appellant in this case. The record shows that Grace Murphy, one of the original plaintiffs, now appellee, testified that she was riding in the Waud car at the time of the accident, and sitting on the front seat with Mrs. Waud, the driver; that they were travelling north on Fulton Avenue approaching Lloyd Avenue; that as they approached the intersection, they were driving 20 to 25 miles per hour; that on account of some children playing in the street, Mrs. Waud reduced the speed of the car to not more than 20 miles per hour; that as they were approximately 100 feet south of Lloyd Avenue, she looked east across Washington Park and could see a distance of 350 to 400 feet, and there was no car approaching on Lloyd Avenue at that time; that the car proceeded in a northerly direction and she glanced to her left, or west and saw no car coming; that as the Waud car was past the middle of the intersection, she heard the roar of a speeding motor and turned to the right and saw the defendant's car approaching; that the car was coming very fast; that when she first saw the car, it had not yet entered the intersection, and the Waud car was three-quarters across the intersection. Evelyn Waud's testimony is practically the same as Grace Murphy's. The testimony of

ous safely, and denied any and all damage claimed by them. He affirmatively alleged that Evelyn had was guilty of wilful and wanton misconduct which caused the collision. Later, the charge of wilful and wanton misconduct of the complaint against were eliminated. The case was tried before a jury who found the issues in favor of the plaintiffs and assessed their damages as follows: Evelyn Hall $800.00; Delbert G. Hall $247.50; Fannie Brandebetter $300.00 and Grace Murphy $4,500.00. Judgment was entered upon these various verdicts and it is from these judgments that this appeal is prosecuted.

At the close of plaintiffs' evidence and also at the close of all the evidence, the defendant entered a motion for a directed verdict. He claimed there was no evidence to sustain the plaintiffs' case and that the defendant was not guilty of any negligence which proximately contributed to the accident in question. The overruling of this motion is the chief contention of the appellant in this case. The record shows that Grace Murphy, one of the original plaintiffs, now appellee, testified that she was riding in the front car at the time of the accident, and sitting on the front seat with Mrs. Hall, the driver; that they were travelling north on Fulton Avenue across Lloyd Avenue; that as they approached the intersection, they were driving 20 to 25 miles per hour; that the element of some children playing in the street, Mrs. Hall reduced the speed of the car to not more than 25 miles per hour; that as they were approximately 100 feet south of Lloyd Avenue, she looked east across Montgomery Park and could see a distance of 350 to 400 feet, and there was no car approaching on Lloyd Avenue at that time; then the car proceeded in a northerly direction and she glanced to her left, or west and saw no car coming; that as the front car was just the middle of the intersection, she heard the roar of a speeding motor and turned to the right and saw the defendant's car approaching; that the car was coming very fast; that when the first saw the car, it had not yet entered the intersection, and the rear car was three-quarters across the intersection. Evelyn Hall's testimony is practically the same as Grace Murphy's. The testimony of

these two witnesses standing alone, would certainly be sufficient to sustain a verdict in favor of the plaintiff and the court did not err in overruling the defendant's motion for a directed verdict.

Maurice Van Landuyt, the appellant, testified in his own behalf that his car was in good condition; that he was driving west on Lloyd Avenue; that he entered Lloyd Avenue at Glenn Rock, which is about one and one-half blocks east of Fulton Street; that he drove west on the north side of Washington park and approached the intersection of both Avenues at the rate of speed of about twenty-five miles per hour; that he saw the car of the appellees approaching Lloyd Avenue; that he first saw it when he was about 250 feet from the intersection; that he again saw it when he was about 25 feet from the intersection, and in his judgment, the appellees' car was 50 feet from the intersection when he was but 25 feet fromit; that he proceeded westward and the other car speeded up across the intersection and the collision occurred. The testimony of the appellant and of Evelyn Waud and Grace Murphy were in conflict and raised a clear issue of fact for the jury to decide. The jury found in favor of the appellees and from a reading of the record, we are satisfied that their finding is correct.

The appellant has assigned error that the court refused to give five of his instructions. The first is, "If you believe from the evidence that the plaintiff by using her faculties with ordinary and reasonable care in looking out for d anger could have avoided suffering the injury of which she complains and that she negligently failed to do so, and thereby proximately contributed to the injury, then the plaintiff cannot recover from the defendant upon the theory of negligence." This instruction was offered separately as for each of the plaintiffs except Delbert O. Waud. This instruction evidently was tendered for the purpose of showing that each of the plaintiffs were required to be upon the lookout for d anger and exercise due care and caution for their own safety. We think that appellant's given instruction 24 and 42 fully covered the points set forth in the refused instruction and the appellant was not

these two witnesses standing alone, would certainly be sufficient to sustain a verdict in favor of the plaintiff and the court did not err in overruling the defendant's motion for a directed verdict.

Maurice Van Landuyt, the appellee, testified in his own behalf that his car was in good condition; that he was driving west on Lloyd Avenue; that he entered Lloyd Avenue at Dunn Road, which is about one and one-half blocks east of Fulton Street; that he drove west on the north side of Washington Park and approached the intersection of both Avenues at the rate of speed of about twenty-five miles per hour; that he saw the car of the appellee approaching Lloyd Avenue; that he first saw it when he was about 250 feet from the intersection; that he again saw it when he was about 25 feet from the intersection, and in his judgment, the appellees' car was 50 feet from the intersection when he was but 25 feet from it; that he proceeded eastward and the other car speeded up across the intersection and the collision occurred. The testimony of the appellant and of Evelyn Ward and Grace Murphy were in conflict and raised a clear issue of fact for the jury to decide. The jury found in favor of the appellee and from a reading of the record, we are satisfied that their finding is correct.

The appellant has assigned error that the court refused to give five of his instructions. The first is, "If you believe from the evidence that the plaintiff by using her faculties with ordinary and reasonable care in looking out for a car could have avoided suffering the injury of which she complains and that she negligently failed to do so, and thereby proximately contributed to the injury, then the plaintiff cannot recover from the defendant upon the theory of negligence." This instruction was offered separately as for each of the plaintiffs except Dolbert v. Ward. This instruction evidently was considered for the purpose of showing that each of the plaintiffs were required to be upon the lookout for a danger and exercise due care and caution for their own safety. We think that appellant's given instruction 24 and 45 fully covered the points set forth in the refused instruction and the appellant was not

prejudiced by the court refusing to give the tendered instruction.

The other refused instruction is:"There was in full force and effect in the State of Illinois at the time of the accident in question the following Statute: 'Motor vehicles travelling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left.' While it is true that this statute does not confer an absolute right of way upon the motor vehicle approaching from the right, the motor vehicle approaching from the left must yield the right of way to the motor vehicle approaching from the right, when it appears that the latter motor vehicle, being driven with due care, will reach the intersection before the motor vehicle approaching from the left can pass over the intersection."

The appellant, in his original brief and argument cites no case to support his contention that this instruction was a proper one to be given by the court to the jury. In his reply brief he cites the case of Riddle vs. Mansager 254 Ill. App. 68, a Second District case. It will be noted in the Riddle case that the instruction started out with, "That if the jury believe from the evidence, etc.," and then quoted the Statute. Then the court in discussing what was necessary to make the instruction applicable, laid down the rule that the driver approaching from the right has the right of way over one approaching from the left, unless the car on the right is sufficiently far away so if being driven with due care, it will not reach the intersection until a car from the left can pass. As an abstract proposition of law, appellant's tendered instruction may be correct, but courts are generally very reluctant to instruct a jury on abstract propositions of law, as they are too apt to get the opinion that the court is instructing them relative to the facts, (People vs. Corbishly 327 Ill. 312.).

In Defendant's given instruction 24 and 33, the law applicab le to the right of way at intersections is set forth, and while the

prejudiced by the court refusing to give the requested instruction.

The court refused instruction is:"Where one is full force and effect in the state of Illinois at the time of the accident in question the following statute: 'Motor vehicles approaching upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left.' While it is true that this statute does not confer an absolute right of way upon the motor vehicle approaching from the right, the motor vehicle approaching from the left must yield the right of way to the motor vehicle approaching from the right, when it appears that the latter motor vehicle, being driven with due care, will reach the intersection before the motor vehicle approaching from the left can pass over the intersection."

The appellant, in his original brief and argument cites no case to support his contention that this instruction was a proper one to be given by the court to the jury. In his reply brief he cites the case of Hindle vs. Passenger Ry. 254 Ill. App. 68, a Second District case. It will be noted in the Hindle case that the instruction started out with, "Then if the jury believe from the evidence, etc.," and then quoted the statute. Then the court in discussing what was necessary to make the instruction applicable, said from the fact that the driver approaching from the right has the right of way over one approaching from the left, unless the car on the right is sufficiently far away so if being driven with due care, it will not reach the intersection until a car from the left can pass. As an abstract proposition of law, appellant's tendered instruction may be correct, but courts are generally very reluctant to instruct a jury on abstract propositions of law, as they are too apt to get the opinion that the court is instructing them relative to the facts, (People vs. Goldsmith 297 Ill. 324.).

In Defendant's given instruction 14 and 32, the law applied to the right of way at intersections is set forth, and while the

Statute is not quoted, the law applicable thereto is stated, and even if the tendered instruction had been in proper form, the jury were instructed relative to the rights of the parties at the intersection and the plaintiff has not been prejudiced by the Court's refusal to give this instruction.

We find no reversible error in the case and the judgment of the trial court is hereby affirmed.

Affirmed.

statute is not quoted, the law applicable thereto is stated, and even if the tendered instruction had been in proper form, the jury were instructed relative to the rights of the parties at the intersection and the plaintiff has not been prejudiced by the Court's refusal to give this instruction.

We find no reversible error in the case and the judgment of the trial court is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On May 12, 1939, the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9416 Agenda No. 16

In the Appellate Court of Illinois

Second District

February Term, A.D. 1939

Tampico Farmers Elevator Company, a corporation,
Plaintiff-Appellant,

vs.

Walnut Grain Company, a corporation, Caroline Keeler and Nellie Breed,
Defendants-Appellees.

Appeal from the Circuit Court of Whiteside County, Illinois

AOA

WOLFE, J.

This is a suit commenced on October 3, 1934, by the Tampico Farmers Elevator Company against the Walnut Grain Company, Caroline Keeler and Nellie Breed, to recover from them the value of corn, which the plaintiff claims belonged to it and which it charges the defendants converted to their own use. The complaint alleges that the plaintiff, a judgment creditor of one Nels P. Rasmussen, levied upon his interest in the corn, and pursuant to such levy the sheriff sold the corn to the plaintiff at sheriff's sale under execution; that subsequently the defendants Keeler and Breed sold the corn to be delivered to the defendant the Walnut Grain Company, without the knowledge and consent of the plaintiff; that none of the defendants have paid the plaintiff the value of the corn; that the defendants have converted the corn to their own use and by reason thereof, they are indebted to the plaintiff for 1,397 bushels of corn valued at $1,033.78, with interest thereon, from the date of the conversion. The defendants answered the complaint denying the title of the plaintiff and the conversion and alleging illegality of the levy and the sale under the execution. The gist of the denial of the title of the plaintiff is that the corn, at the time of the

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vs.

Walnut Grain Company, a corporation,
Carolina Keeler and Nellie Breed,
Defendants-Appellees.

Appeal from the Circuit Court
of Whiteside County,
Illinois

MOLER, J.

This is a suit commenced on October 3, 1924, by the Tampico Farmers Elevator Company against the Walnut Grain Company, Carolina Keeler and Nellie Breed, to recover from them the value of corn, which the plaintiff claims belonged to it and which it charges the defendants converted to their own use. The complaint alleges that the plaintiff, a judgment creditor of one Nels E. Rasmussen, levied upon his interest in the corn, and pursuant to such levy the sheriff sold the corn to the plaintiff at sheriff's sale under execution; that subsequently the defendants Keeler and Breed sold the corn to be delivered to the defendant the Walnut Grain Company, without the knowledge and consent of the plaintiff; that none of the defendants have paid the plaintiff the value of the corn; that the defendants have converted the corn to their own use and by reason thereof, they are indebted to the plaintiff for 1,397 bushels of corn valued at $1,033.78, with interest thereon, from the date of the conversion. The defendants answered the complaint denying the title of the plaintiff and the conversion and alleging illegality of the levy and the sale under the execution. The gist of the denial of the title of the plaintiff is that the corn, at the time of the

levy, was the property of Leonard G. Rasmussen, the son of the judgment debtor Nels P. Rasmussen; that Leonard G. Rasmussen, after the levy and sale, transferred the title to the corn to the defendants Keeler and Breed by a bill of sale. The corn was purchased from them by the defendant, Walnut Grain Company.

Leonard G. Rasmussen is not the defendant in execution, nor does he claim title to the corn through his father, the defendant in execution. As purchaser at the execution sale, the plaintiff took only such title and interest in the corn, if any, which was held or owned by Nels P. Rasmussen at the time of the levy and sale. The corn was in the actual possession of Leonard G. Rasmussen when the levy was made. The burden was on the plaintiff to prove that the corn belonged to Nels P. Rasmussen at the time of the levy.

For about twenty years before 1931, Nels P. Rasmussen had been farming three farms in Tampico Township in Whiteside County. The farms are known as the McBride farm, the Griffith farm and the Ross farm. Nels P. Rasmussen lived on the Ross farm during that time and also when the levy was made. There are no buildings on the McBride farm with the exception of a double corn crib. In 1930 Nels P. Rasmussen became financially involved and various judgments were entered against him. On February 2, 1931, a written lease was executed between James McBride, the then owner of the McBride farm, and Leonard G. Rasmussen for the McBride farm for the period from March 1, 1931, to March 1, 1932. Written leases were also executed by the owners of the Griffith farm and the Ross farm with Leonard G. Rasmussen for those farms for the term of March 1, 1931, to March 1, 1932. Leonard G. Rasmussen was the lessee named in all of those leases. On February 2, 1931, an agreement was entered into between Nels P. Rasmussen and Leonard G. Rasmussen reciting that Leonard G.

levy, was the property of Leonard G. Rasmussen, the son of the judgment debtor Nels F. Rasmussen; that Leonard G. Rasmussen, after the levy and sale, transferred the title to the corn to the defendants Lester and Fred by a bill of sale. The corn was purchased from them by the defendant, Grant Grain Company.

Leonard G. Rasmussen is not the defendant in execution, nor does he claim title to the corn through his father, the defendant in execution. As purchaser at the execution sale, the plaintiff took only such title and interest in the corn, if any, which was held or owned by Nels F. Rasmussen at the time of the levy and sale. The corn was in the actual possession of Leonard G. Rasmussen when the levy was made. The burden was on the plaintiff to prove that the corn belonged to Nels F. Rasmussen at the time of the levy.

For about twenty years before 1931, Nels F. Rasmussen had been farming three farms in Douglas township in Whiteside County. The farms are known as the Moffride farm, the Griffith farm and the Ross farm. Nels F. Rasmussen lived on the Ross farm during that time and also when the levy was made. There are no buildings on the Moffride farm with the exception of a double corn crib. In 1930 Nels F. Rasmussen became financially involved and various judgments were entered against him. On February 2, 1931, a written lease was executed between James Moffride, the then owner of the Moffride farm, and Leonard G. Rasmussen for the Moffride farm for the period from March 1, 1931, to March 1, 1932. Written leases were also executed by the owners of the Griffith farm and the Ross farm with Leonard G. Rasmussen for those farms for the term of March 1, 1931, to March 1, 1932. Leonard G. Rasmussen was the lessee named in all of those leases. On February 2, 1931, an agreement was entered into between Nels F. Rasmussen and Leonard G. Rasmussen recitING that Leonard G.

Rasmussen had entered into leases demising to him the three farms from March 1, 1931, to March 1, 19 32. The agreement provided that in consideration of services rendered and to be rendered by Nels P. Rasmussen for Leonard G. Rasmussen that Leonard G. Rasmussen would assign and transfer to Nels P. Rasmussen all his interest in the crops grown on the three farms and the proceeds from the sale thereof. Leonard G. Rasmussen agreed to perform the usual labor of a farm hand on the farms under the direction ofNels P. Rasmussen and to receive out of the proceeds from the farms forty dollars per month.

A lease was executed between James McBride and Leonard G. Rasmussen for the McBride farm for the year March 1, 1932, to March 1, 1933. James McBride died on August 26, 1932, and the defendants Caroline Keeler and Nellie Breed became the owners of the McBride farm. On September 12, 1932, a lease was executed between the new owners and Leonard G. Rasmussen for the McBride farm for the term March 1, 1933 to March 1, 1934. The lease provided as rental two-fifths of all crops grown on the farm during the term of the lease. The corn was to be put in and division of the crop made at elevator. On the back of the lease is an undated memorandum which extended the lease from March 1, 1934 to March 1, 1935, providing, however, that when the corn was harvested it should be divided as husked, or divided in the crib. The levy was made on the corn on December 21, 1933, and the corn was sold under execution on March 12, 1934. It is the ownership of the corn which was grown and cribbed on the McBride farm in the year 1933, which is in question in this case.

Nels P. Rasmussen testified that he operated the McBride farm, the Griffith farm and the Ross farm for the demised terms thereof, from March 1, 1931, to March 1, 1933, under the terms of the contract entered into by him and his son Leonard G. Rasmussen

Rasmussen had entered into leases demising to him the three farms from March 1, 1931, to March 1, 1932. The agreement provided that in consideration of services rendered and to be rendered by Nels P. Rasmussen for Leonard G. Rasmussen that Leonard G. Rasmussen would assign and transfer to Nels P. Rasmussen all his interest in the crops grown on the three farms and the proceeds from the sale thereof. Leonard G. Rasmussen agreed to perform the usual labor of a farm hand on the farms under the direction of Nels P. Rasmussen and to receive out of the proceeds from the farms forty dollars per month.

A lease was executed between James McBride and Leonard G. Rasmussen for the McBride farm for the year March 1, 1932, to March 1, 1933. James McBride died on August 26, 1932, and the defendants Carolina Meier and Nellie Irwed became the owners of the McBride farm. On September 12, 1932, a lease was executed between the new owners and Leonard G. Rasmussen for the McBride farm for the term March 1, 1933 to March 1, 1934. The lease provided as rental two-fifths of all crops grown on the farm during the term of the lease. The corn was to be put in and division of the crop made at elevator. On the back of the lease is an undated memorandum which attached the lease from March 1, 1934 to March 1, 1935, providing, however, that when the corn was harvested it should be divided as husked, or divided in the crib. The last was made on the corn on December 21, 1933, and the corn was sold under execution on March 12, 1934. It is the ownership of the corn which was grown and cribbed on the McBride farm in the year 1933, which is in question in this case.

Nels P. Rasmussen testified that he operated the McBride farm, the Griffith farm and the Moe farm for the demised terms thereof, from March 1, 1931, to March 1, 1933, under the terms of the contract entered into by him and his son Leonard G. Rasmussen

on February 12, 1931. There is no evidence in the record proving what services were rendered and to be rendered by Nels P. Rasmussen for Leonard G. Rasmussen as the supporting consideration of the contract dated February 21, 1931. The evidence shows that Nels P. Rasmussen farmed the McBride farm from March 1, 1931, to March 1, 1932, and sold the crops raised thereon. It is clear from the evidence that the leases for the farms executed before September 12, 1932, and the contract of February 2, 1931, were a devise or scheme to deceive the creditors of Nels P. Rasmussen. There can be no doubt from the evidence from the date of the first written leases for the farms made to Leonard G. Rasmussen, until the execution of the lease dated September 12, 1932, that Leonard G. Rasmussen was a party to the scheme to hinder, delay and defraud the creditors of Nels P. Rasmussen and as the fictitious lessee of the farms, possessor and ostensible owner of the crops raised on the farms, Leonard G. Rasmussen was a trustee of those crops for the use and benefit of Nels' creditors and the crops were subject to levy by the judgment creditors of Nels P. Rasmussen. (Coale v. Moline Plow Co., et al, 134 Ill. 350; Kingman Plow Co., v. Knolton, (Ia.) 119 N. W. 754). The question presented by the record is whether this condition continued after the 12th day of September, 1932. We apprehend that an answer to this question is required before there can be a determination of the status of any defendant as a bona fide purchaser of the corn and the right, if any, of any defendant to question the legality of the levy and sheriff's sale under the execution.

The testimony of Nels P. Rasmussen and Leonard G. Rasmussen is in direct conflict on the material question of the ownership of the corn raised on the McBride farm for the crop year 1933. The circumstances surrounding and attending the execution of the lease between Nellie Breed and Caroline Keeler and Leonard G. Rasmussen on

on February 12, 1931. There is no evidence in the record proving what services were rendered and to be rendered by Nels P. Rasmussen for Leonard G. Rasmussen as the supporting consideration of the contract dated February 21, 1931. The evidence shows that Nels P. Rasmussen farmed the Meadie farm from March 1, 1931, to March 1, 1932, and sold the crops raised thereon. It is clear from the evidence that the leases for the farms executed before September 12, 1932, and the contract of February 2, 1931, were a device or scheme to deceive the creditors of Nels P. Rasmussen. There can be no doubt from the evidence from the date of the first written leases for the farms made to Leonard G. Rasmussen, until the execution of the lease dated September 12, 1932, that Leonard G. Rasmussen was a party to the scheme to hinder, delay and defraud the creditors of Nels P. Rasmussen and as the fictitious lessee of the farms, possessor and ostensible owner of the crops raised on the farms, Leonard G. Rasmussen was a trustee of those crops for the use and benefit of Nels' creditors and the crops were subject to levy by the judgment creditors of Nels P. Rasmussen. (Ossia v. Moline Plow Co., et al, 134 Ill. 350; Kingman Plow Co., v. Bunton, (Ia.) 112 N. W. 754). The question presented by the record is whether this condition continued after the 12th day of September, 1932. We apprehend that an answer to this question is required before there can be a determination of the status of any defendant as a bona fide purchaser of the corn and the right, if any, of any defendant to question the legality of the levy and sheriff's sale under the execution.

The testimony of Nels P. Rasmussen and Leonard G. Rasmussen is in direct conflict on the material question of the ownership of the corn raised on the Meadie farm for the crop year 1932. The circumstances surrounding and attending the execution of the lease between Nellie Reed and Cornelius Keeler and Leonard G. Rasmussen on

September 12, 1932, were first testified to by Nels P. Rasmussen on behalf of the plaintiff. He testified that after the death of James McBride in August, 1932, he received a letter from Nellie Breed stating that he could rent the farm under the same terms that he had rented it from March 1, 1932, to March 1, 1933. That on September 12, 1932, in response to the letter, he went to Princeton to the office of attorney Spaulding, who was the executor of the will of James McBride. It was at that time that the lease was drawn demising the McBride farm to Leonard G . Rasmussen from March 1, 1932 to March 1, 1933, by defendants Caroline Keeler and Nellie Breed. Nels P. Rasmussen further testified that he wanted the lease made out to Leonard G. Rasmussen as the First National Bank was threatening to close in on him; that Spaulding told Keeler and Breed the reason Nels P. Rasmussen wanted the lease made to Leonard G. Rasmussen, and that they said it was all right to do so. That he took a duplicate of the lease and the lessors took the other. Leonard G. Rasmussen, on behalf of the defendants, testified that he did not remember that there was any conversation when the lease was signed, relative to the matter that his father wanted him named as the lessee because of Nels' creditors; that he took a duplicate of the lease and that his father never had possession of it so far as he knew; that he did not know any reason why the farm was leased to him instead of his father. Caroline Keeler testified that Nels P. Rasmussen did not say that he wanted the lease put in Leonard G. Rasmussen's name because Nels P. Rasmussen was afraid of his creditors jumping on him; that she never knew before August 31, 1934, that Nels P. Rasmussen claimed to be the tenant on the McBride farm.

The plaintiff also introduced other evidence from which the conclusion might be drawn, that Nels P. Rasmussen was the owner of the corn in question and that the subterfuge consisting of

September 15, 1922, were first testified to by Nels T. Rasmussen on behalf of the plaintiff. He testified that after the death of Jesse Morrida in August, 1922, he received a letter from Willis Greed stating that he could rent the farm under the same terms that he had rented it from March 1, 1922, to March 1, 1923. That on September 4th, 1922, in response to the letter, he went to Tallahassee to the office of attorney Spaulding, who was the executor of the will of James Morrida. It was at that time that the lease was drawn demising the Morrida farm to Leonard G. Rasmussen from March 1, 1922 to March 1, 1923, by defendants Willis Greed and Hallie Greed. Nels T. Rasmussen further testified that he wrote the lease and took it out to Leonard G. Rasmussen to the first national Bank and there talking to close in him; that Spaulding told Greed and read the lease to Nels T. Rasmussen wanted the lease made to Leonard G. Rasmussen, and that they said it was all right to do so. That he took a duplicate of the lease and the lessors took the other. Leonard G. Rasmussen, on behalf of the defendants, testified that he did not remember that there was any conversation upon the lease was signed, relative to the matter that his father wanted his name as the lessee because of Nels' credit-ors; that he took a duplicate of the lease and that his father never had possession of it so far as he knew; that he did not know any reason why the farm was leased to him instead of his father. Carolina Greed testified that Nels T. Rasmussen did not say that he wanted the lease put in Leonard G. Rasmussen's name because Nels T. Rasmussen was afraid of his creditors levying on him; that she never knew before August 31, 1923, that Nels T. Rasmussen claimed to be the tenant on the Morrida farm.

The plaintiff also introduced other evidence from which the conclusion might be drawn, that Nels T. Rasmussen was the owner of the corn in question and that the subterfuge consisting of

the leases being made in Leonard G. Rasmussen's name continued from March 1, 1933 to March 1, 1934. Nels P. Rasmussen also testified for the plaintiff that he farmed the three farms from March 1, 1933, to March 1, 1934, and that he was the actual tenant on the farm; that he did not operate the farms under the contract signed by him and Leonard G. Rasmussen on February 2, 1931, for the crop year of 1933; that Leonard G. Rasmussen was married in January, 1932 and began farming for himself on a place known as the Pat Kelly farm. He further testified that in the year 1933 to 1934, he furnished the seed and the farm machinery which was used to cultivate the McBride farm; that he hired several men, including G. L. Love, to shock the crop of oats raised on the farm and that he sold some of it to Stacy Anderson and that some of it was sold at the sheriff's sale; that he cut corn from about nine acres on the farm and placed the ensilage in the silo which he rented from Henry Colby and fed the ensilage to his cattle; that he hired Dewey Fritz and Will Erickson to pick the corn which was put in the crib on the farm; that he heard that Leonard G. Rasmussen paid the men who gathered the corn; that Leonard G. Rasmussen helped pick the corn; that in the winter of 1933-1934, accompanied by Henry Colby, he went to see the defendants Keeler and Breed with reference to renting the farm again for the term from March 1, 1934 to March 1, 1935; that the defendants then stated that he had operated the farm all right, but that they did not want to rent the farm to him as they did not care to be mixed up in his and Leonard G. Rasmussen's deal.

G. L. Love testified that he helped harvest the oats crop on the McBride farm in 1933; and that Nels P. Rasmussen hired him and paid him for this work, Stacy Anderson testified that he bought some oats from Nels P. Rasmussen on the McBride farm in the summer of 1933, and paid him for the same. Henry Colby testified that some of

the leases being made to Leonard G. Rasmussen's case continued from March 1, 1923 to March 1, 1924. Viola P. Rasmussen also testified for the plaintiff that he farmed the three farms from March 1, 1923, to March 1, 1924, and that he was the actual tenant on the farm; that he did not operate the farms under the contract signed by him and Leonard G. Rasmussen on January 8, 1923, for the crop year of 1923; that Leonard G. Rasmussen was married in January, 1923 and began farming for himself on a place known as the Pat Kelly farm. He further testified that in the year 1923 and 1924, he furnished the seed and the farm machinery which was used to cultivate the Moldie farm; that he hired several men, including G. L. Love, to shock the crop of oats raised on the farm and that he sold some of it to Tobey Anderson and that some of it was sold at the sheriff's sale; that he cut corn from about nine acres on the farm and placed the ensilage in the silo which he rented from Henry Colby and fed the ensilage to his cattle; that he hired Henry Fritz and Bill Erickson to pick the corn which was put in the silo on the farm; that he heard that Leonard G. Rasmussen paid the men who husked the corn; that Leonard G. Rasmussen helped pick the corn; that in the winter of 1923-1924, accompanied by Henry Colby, he went to see the defendants Lester and Fred with reference to renting the farm again for the term from March 1, 1924 to March 1, 1925; that the defendants then stated that he had operated the farm all right, but that they did not want to rent the farm to him as they did not care to be mixed up in his and Leonard G. Rasmussen's deal.

G. L. Love testified that he helped harvest the oats crop on the Moldie farm in 1923; and that Viola P. Rasmussen hired him and paid him for this work. Tobey Anderson testified that he bought some oats from Viola P. Rasmussen on the Moldie farm in the summer of 1923, and paid him for the same. Henry Colby testified that some of

the corn on the McBride farm was cut and the ensilage placed in his silo which Nels P. Rasmussen rented from him and from which he fed the ensilage to Nels P. Rasmussen's cattle; he also corroborated Nels P. Rasmussen's testimony concerning the conversation with Keeler and Breed about renting the farm for the year 1934-1935. Frank Anderson testified that he helped haul corn from the McBride farm to the Colby silo in the fall of 1933, and that he was employed to do so by Nels P. Rasmussen. Dewey Fritz testified that in the fall of 1933, he helped gather corn on the McBride farm and was employed to do so by Nels P. Rasmussen; that after he finished picking the corn, Leonard G. Rasmussen asked him to take his pay from him for picking the corn in order that he, Leonard G. Rasmussen, could hold the corn on the McBride farm.

Leonard G. Rasmussen testified that after he was married he owned some horses and corn plows; that he used some of his father's machinery; that he farmed both the McBride and Kelly farms from March 1, 1933 to March 1, 1934; that his father never helped him with the work; that he furnished the seed corn planted on the McBride farm in the spring of 1933; that he furnished most of the seed oats that year and his father provided seed for a few acres. That none of the oats were sold to Stacy Anderson, but that they were hauled to the elevator in Anderson's name without his consent; that he hired the men to gather the corn, but denies that he offered to pay Dewey Fritz in order that he might hold the corn.

On June 23, 1934, Nels P. Rasmussen filed in the Circuit Court of Whiteside County a complaint against Leonard G. Rasmussen for an injunction to restrain Leonard G. Rasmussen from cutting and removing wheat growing on the McBride farm. The defendants Caroline Keeler and Nellie Breed were also parties defendants to the suit. In the complaint Nels P. Rasmussen alleged and claimed that he was the owner of the wheat growing on the McBride farm

the corn on the McBride farm was cut and the stalkage placed in his silo which Nels P. Rasmussen rented from him and from which he fed the stalkage to Nels P. Rasmussen's cattle; he also corroborated Nels P. Rasmussen's testimony concerning the conversation with Zeeler and Greed about renting the farm for the year 1924-1925. Frank Lauter-corroborated that he hauled corn from the McBride farm to the Dolby silo in the fall of 1923, and that he was employed to do so by Nels P. Rasmussen. Dewey Fritz testified that in the fall of 1923, he helped gather corn on the McBride farm and was employed to do so by Nels P. Rasmussen; that after he finished plucking the corn, Leonard O. Rasmussen asked him to take his pay from him for plucking the corn in order that he, Leonard O. Rasmussen, could hold the corn on the McBride farm.

Leonard O. Rasmussen testified that after he was married he owned some horses and corn plows; that he used some of his father's machinery; that he farmed both the McBride and Kelly farms from March 1, 1923 to March 1, 1924; that his father never helped him with the work; that he furnished the seed corn planted on the McBride farm in the spring of 1923; that he furnished most of the seed oats that year and his father provided seed for a few acres. That none of the oats were sold to Stacy Anderson, but that they were hauled to the elevator in Anderson's name without his consent; that he ~~made~~ hired the men to gather the corn, but denies that he offered to pay Dewey Fritz in order that he might hold the corn.

On June 24, 1924, Nels P. Rasmussen filed in the Circuit Court of Whiteside County a complaint against Leonard O. Rasmussen for an injunction to restrain Leonard O. Rasmussen from cutting and removing wheat growing on the McBride farm. The defendants Dorothy Zeeler and Phillip Greed were also parties defendants to the suit. In the complaint Nels P. Rasmussen alleged and claimed that he was the owner of the wheat growing on the McBride farm

and the actual tenant. A temporary injunction was issued and a motion was made by Leonard G. Rasmussen to dissolve the injunction. Attached to the motion is an affidavit by Caroline Keeler, dated June 27, 1934, in which she deposes, among other things, that when she visited the McBride farm, she noticed that the work thereon, was being performed by Leonard G. Rasmussen and that on no occasion has she ever seen Nels P. Rasmussen working on the farm. The bill of sale from Leonard G. Rasmussen to Caroline Keeler and Nellie Breed for the corn in question is dated August 25, 1934. The bill of sale recites, "In consideration of the sum of other good and valuable considerations and one dollars." There is no evidence in the record what good or valuable consideration was given by Keeler and Breed for the corn transferred by the bill of sale. When the bill of sale was executed the corn was in charge of a custodian appointed by the sheriff when the levy was made and who served as such until the day of the sheriff's sale.

It also appears from the record that subsequent to the 12th day of September, 1932, Nels P. Rasmussen conveyed personal property of his to Leonard G. Rasmussen who gave a chattel mortgage on the property to one Agnes Erickson, a creditor of Nels P. Rasmussen. That in a proceeding to determine the rights of creditors of Nels P. Rasmussen in his property, commenced on January 11, 1934, the Circuit Court of Whiteside County held that Leonard G. Rasmussen had no title to the property described in the chattel mortgage and the foreclosure of the mortgage was permanently enjoined by that court.

The manifest weight of the evidence is to the effect that at the time of the levy on the corn Nels P. Rasmussen was the owner thereof, and that Leonard G. Rasmussen was a trustee of the corn for the use and benefit of Nels P. Rasmussen's creditors. Also, that the defendants Caroline Keeler and Nellie Breed were apprized of facts and circumstances which would cause a reasonably prudent person to

and the actual tenant. A temporary injunction was issued and a motion was made by Leonard G. Rasmussen to dissolve the injunction. Attached to the motion is an affidavit by Carolina Keller, dated June 27, 1934, in which she deposes, among other things, that when she visited the Mellie farm, she noticed that the work thereon, was being performed by Leonard G. Rasmussen and that on no occasion has she ever seen Nels P. Rasmussen working on the farm. The bill of sale from Leonard G. Rasmussen to Carolina Keller and Mellie Kreed for the corn in question is dated August 20, 1934. The bill of sale recites, "In consideration of the sum of other good and valuable considerations and one dollars." There is no evidence in the record that such or similar consideration was given by Keller and based for the corn transferred by the bill of sale. When the bill of sale was executed the corn was in charge of a custodian appointed by the sheriff when the levy was made and who served as such until the day of the sheriff's sale.

It also appears from the record that subsequent to the 12th day of September, 1930, when P. Rasmussen conveyed personal property of his to Leonard G. Rasmussen who gave a chattel mortgage on the property to one Agnes Erickson, a creditor of Nels P. Rasmussen. That in a proceeding to determine the rights of creditors of Nels P. Rasmussen in his property, commenced on January 11, 1932, the Circuit Court of Whiteside County held that Leonard G. Rasmussen had no title to the property described in the chattel mortgage and the foreclosure of the mortgage was permanently enjoined by that court.

The heaviest weight of the evidence is to the effect that at the time of the levy on the corn Nels P. Rasmussen had the power thereof, and that Leonard G. Rasmussen was a trustee of the corn for the use and benefit of Nels P. Rasmussen's creditors. Also, that the defendants Caroline Keller and Mellie Kreed were apprized of facts and circumstances which would cause a reasonably prudent person to

believe that Leonard G. Rasmussen was a party to the scheme to deceive and mislead the creditors of Nels P. Rasmussen, and that no title to the corn passed to them under the bill of sale by Leonard G. Rasmussen, dated August 25, 1934.

As before stated the levy on the corn was made on December 21, 1933. On March 5, 1934, seven days before the sale under the execution, Leonard G. Rasmussen, Caroline Keeler and Nellie Breed signed applications for Farm Warehouse Certificates, which were issued and indorsed by them to the Commodity Credit Corporation as collateral security for their Corn Producers Note for $1080.00. The application states that the corn is the property of Leonard G. Rasmussen, Caroline Keeler and Nellie Breed as landlord and tenant partnership with lease expiring March 1, 1935. The corn was sealed in the crib on the McBride farm by the Department of Agriculture. The corn was sold at the exeeu tion sale to the plaintiff subject to the Government lien and that of the landlord.

After the execution sale on March 12, 1934, the corn remained on the McBride farm until August 31, 1934, apparently in the possession of Leonard G. Rasmussen, who hauled it from the crib to the elevator of the defendant, the Walnut Grain Company. The Walnut Grain had purchased it from Keeler and Breed. The Government loan of $1,103.00 was paid and later deducting the cost of hauling and other items of expense, the balance of the purchase price of the corn of $512.48 was paid to Keeler and Breed. There is proof that the Walnut Grain Company had no actual notice of the levy on the corn.

It is contended by the defendant the Walnut Grain Compahy, that it is a bona fide purchaser of the corn for value. This contention is based on its claim that the levy indorsed on the execution does not contain a certain and definite description of the corn sufficient to inform said defendant that the corn had been levied on. The indorsement of a levy on personal property should designate

believe that Leonard G. Rasmussen was a party to the scheme to deceive and mislead the creditors of Dale E. Rasmussen, and that no title to the corn passed to them under the bill of sale by Leonard G. Rasmussen, dated August 16, 1934.

As before stated the levy on the corn was made on December 21, 1933. On March 8, 1934, seven days before the sale under the execution, Leonard G. Rasmussen, Carolina Keeler and Millie Breed signed applications for Farm Warehouse Certificates, which were issued and indorsed by them to the Commodity Credit Corporation as collateral security for their Corn Producers Note for $1080.00. The application states that the corn is the property of Leonard G. Rasmussen, Carolina Keeler and Millie Breed as landlord and tenant respectively with lease expiring March 1, 1935. The corn was sealed in the crib on the McGuide farm by the Department of Agriculture. The corn was sold at the execution sale to the plaintiff subject to the Government lien and that of the landlord.

After the execution sale on March 12, 1934, the corn remained on the McGuide farm until August 31, 1934, apparently in the possession of Leonard G. Rasmussen, who hauled it from the crib to the elevator of the defendant, the Valley Grain Company. The Valley Grain had purchased it from Keeler and Breed. The Government loan of $1,103.00 was paid and later deducting the cost of hauling and other items of expense, the balance of the purchase price of the corn of $512.48 was paid to Keeler and Breed. There is proof that the Valley Grain Company had no actual notice of the levy on the corn.

It is contended by the defendant the Valley Grain Company, that it is a bona fide purchaser of the corn for value. This contention is based on its claim that the levy indorsed on the execution does not contain a certain and definite description of the corn sufficient to inform said defendant that the corn had been levied on. The indorsement of a levy on personal property should designate

the chattels by ~~mind~~ kind or description, so that others interested, such as innocent purchasers or other judgment creditors than the judgment creditor in execution on which the levy is indorsed, may be notified of a change or possession by means of the levy. (Davidson v. Waldron, et al, 31 Ill. 120). The indorsement of the execution of the levy in this case is: "On this 21st day of December, 1933, by virtue of the within execution, I have levied upon all right, title and interest of Nels P. Rasmussen and to the following property: one small safe, shot gun, 12 head of cows, etc., "800 bushels of corn, and all his interest in the corn, 600 bushels of oats, cement mixer, etc. Said levy being made subject to levy of Agnes Erickson on execution No. 9806. Notice of levy within execution was posted on the farm occupied by Nels P. Rasmussen being the southeast quarter of section 26, township 19 north, range 6 east of 4th P. M., Whiteside County, Illinois, another notice on the corn crib on the northeast quarter of section 36, township and range aforesaid." The northeast quarter of said section 36 is the McBride farm. It is to be noted that the indorsement does not state that the "800 bushels of corn" is located in a crib nor give the location of the corn. In our opinion the indorsement was insufficient to give notice of change of possession. (Davidson v. Waldron, supra.) There was no change of possession of the corn after the sheriff's sale before the corn was purchased by the Walnut Grain Company. It is our conclusion that the Walnut Grain Company was a bona fide purchaser of the corn for value.

The sale was held on the Griffith farm where Nels P. Rasmussen lived. It is contended by the defendants 'that the corn was not present at the place of sale.' It is our opinion that the defendants Breed and Keeler are not in a position to raise this point. (Cook v. Timmons, 67 Ill. 203).

At the sheriff's sale the plaintiff bought 1101 bushels of corn, which was on the McBride farm subject to the landlord's lien

the chattels by kind or description, so that others interested, such as innocent purchasers or other judgment creditors than the judgment creditor in execution on which the levy is indorsed, may be notified of a change or possession by means of the levy. (Davidson v. Waldron, et al, 31 Ill. 120). The indorsement of the execution of the levy in this case is: "On this 21st day of December, 1878, by virtue of the within execution, I have levied upon all right, title and interest of Nels . Rasmussen and to the following property: one small safe, anot run, 12 head of cows, etc., 800 bushels of corn, and all his interest in the corn, 600 bushels of oats, cement mixer, etc. Said levy being made subject to levy of James Erickson on execution to. 3906. Notice of levy within execution was posted on the farm occupied by Nels I. Rasmussen being the southeast quarter of section 26, township 15 north, range 6 east of 4th P. M., Whiteside County, Illinois, another notice on the barn door on the northeast quarter of section 26, township and range aforesaid." The northeast quarter of said section 26 is the Wendle farm. It is to be noted that the indorsement does not state that the "800 bushels of corn" is located in a crib nor give the location of the corn. In our opinion the indorsement was insufficient to give notice of change of possession. (Davidson v. Waldron, supra.) There was no change of possession of the corn after the sheriff's sale before the corn was purchased by the Walnut Grain Company. It is our conclusion that the Walnut Grain Company was a bona fide purchaser of the corn for value.

The sale was held on the Griffith farm where Nels P. Rasmussen lived. It is contended by the defendants that the corn was not present at the place of sale. It is our opinion that the defendants Fred and Lester are not in a position to raise this point. (Cook v. Tiemann, 67 Ill. 228).

At the sheriff's sale the plaintiff bought 1101 bushels of corn, which was on the Griffith farm subject to the landlord's lien

of two-fifths thereof. The trial court rendered a judgment for the defendants.

The judgment of the Circuit Court of Whiteside County is reversed and the case remanded with directions to that court to enter judgment in favor of the plaintiff for the value of the corn, less two-fifths thereof being deducted for landlord's lien, with interest thereon from the first of September, 1934, until the entry date of the judgment, against the defendants now appearing in the suit excepting the defendant, the Walnut Grain Company.

Reversed and remanded with directions.

of two-fifths thereof. The trial court rendered a judgment for the defendants.

The judgment of the Illinois Court of Appeals was reversed and the case remanded with directions to that court to enter judgment in favor of the plaintiff for the value of the cars, less two-fifths thereof being tendered for Lindford's use, with interest thereon from the first of September, 1918, until the entry date of the judgment, against the defendants now appearing in the suit except the defendant, the Walsh Train Company.

Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

Opinion filed Oct. 1, 1939

PUBLISHED IN ABSTRACT

Abstract

Charles E. LeHew, Plaintiff-Appellee, v. Jack Toombs, Defendant-Appellant.

Appeal from Circuit Court of Macon County.

APRIL TERM, A. D. 1939.

300 I.A. 614

Gen. No. 9,151 **Agenda No. 21**

MR. JUSTICE HAYES delivered the opinion of the Court.

Charles E. LeHew, plaintiff-appellee, will hereinafter be called plaintiff, and Jack Toombs, defendant-appellant, will hereinafter be called defendant.

This case is an appeal from the Circuit Court of Macon County, Illinois, where judgment was entered upon the verdict of a jury against the defendant Jack Toombs, in favor of the plaintiff Charles E. LeHew, in the sum of four thousand nine hundred sixteen dollars and sixty-six cents ($4,916.66), on a complaint of assault and battery. Complaint consisted of one count, which charged an assault and battery on the plaintiff by the defendant. The defendant filed an answer of general denial and a counterclaim alleging an assault by plaintiff on the defendant.

The occurrences out of which the suit arose took place at the garage of the defendant in Decatur, Illinois, on September 1, 1937. Plaintiff testified that he was sent to the garage of defendant by his father to collect a three dollar bill from the defendant. Defendant denied owing it and claimed he knew nothing of the bill. It appears from the record that an argument ensued, plaintiff's description of which is that the defendant said to him, "you called me a liar," and he further stated that if he did it again he would take his (plaintiff's glasses off and knock h—— out of him, and then defendant struck him and knocked him down. Another witness for the plaintiff testified that as plaintiff started to get up, defendant hit him the second time. Defendant denies this and insists that plaintiff struck the first blow. Defendant, in his own testimony, admits that he took blaintiff's glasses off and hit him and knocked him down, and admits he hit him the second time after he got up, but claims that plaintiff

struck the first blow, and that he didn't hit him the second time until plaintiff started to follow him. The evidence shows that the defendant was the heavier and stronger of the two; and that defendant had two of his employees present at the time. The evidence further shows there was little provocation for assault and battery, and the conflict is over who struck the first blow. The Jury, by their verdict, evidently believed the plaintiff, and disbelieved the defendant. Plaintiff received severe injuries,—a crushing of the bones of the face and nose—and was taken to the hospital and there confined for two weeks. The attending physician testified that he found the left side of the cheek sunken; the left eye blood-shot and discolored; a swelling of the soft tissues about that area, and a fracture of the cheek bone which bone was pushed down and out of position. An x-ray was taken and the physician operated and brought the bones back into position. He further testified that the bone which was fractured has a hole in it, and when the bones were leveled out, it was discovered there was a hole through the sinus into the mouth. The doctor stated he had examined the man just before the trial and had found the track from the sinus into the mouth had remained open, and that in the interim he had burned off, with silver nitrate, a granulation of tissue or proud-flesh which had come from this opening into the mouth and which had interfered with the use of the upper plate of his teeth. He further testified that the opening was still there, and that it was draining into the mouth, and as a result of the injury, and for quite some time afterward, there was a paralysis of the nerves of the left side of his face. He gave, as his opinion, that unless some further surgery was done in an attempt to close the opening between the sinus and the mouth that it would undoubtedly remain open and continue to drain. He was not certain whether surgery would cure it. Plaintiff testified, at the time of the trial, that he was bothered with this discharge into his mouth; that it made him sick to his stomach; that he had difficulty in keeping his false teeth in place, and that it interfered with his talking.

The first ground for error relied upon by the defendant is that the verdict is against the manifest weight of the evidence. This is clearly untenable. It is fundamental that a verdict of the jury will not be disturbed where the evidence is conflicting and that

produced by either party when considered alone is sufficient to sustain the verdict in his favor. In addition to the general verdict there was a finding in the negative to the following special interrogatory requested by the defendant.

> "Question: Do you find from the evidence that the blows complained of were struck by the defendant without malice and under circumstances which would have led a reasonable man to believe that was necessary to his proper self defense?
>
> Answer: No."

The finding of a jury on a question of fact conclusively binds the parties submitting it.

Complaint is made by defendant that the Court refused to permit him to show the intent, but the record discloses the defendant testified that he hit him with the intent of inflicting bodily injury upon him. The law is, "if the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial. The intent to commit the unlawful act is sufficient, or in other words, if the defendant did an illegal act which was likely to prove injurious to another, he is answerable for the consequences which directly or naturally result from his conduct even though he did not intend to do the particular injury which followed." 5 C. J. 621, 622.

The next ground for reversal was the conduct of counsel. Defendant, in support of this, cite a large number of pages in the abstract, examination of which doesn't show anything unusual other than that which transpires in a hotly-contested trial.

We find no harmful error in the instructions. The only question that has caused us much concern is the amount of the verdict. It is large, and we have given a good deal of consideration to this, but in view of the circumstances surrounding the unwarranted assault; the seriousness of the results, and the present physical condition of the plaintiff, we do not feel justified in disturbing the verdict of the jury and the judgment of the trial court in overruling the motion for a new trial.

For the reasons herein assigned, the judgment of the Circuit Court is hereby affirmed.

Judgment Affirmed.

(Four pages in original opinion)

PUBLISHED IN ABSTRACT

Emma J. McMahan, Appellant, v. Robert C. Daugherty, Doing Business as Yellow Cab Company, Appellee.

Appeal from Circuit Court, of Vermilion County.

JANUARY TERM, A. D. 1939.

Gen. No. 9,078 **Agenda No. 8**

PER CURIAM:

This is an appeal from a judgment of the circuit court of Vermilion county, in a personal injury case finding the defendant not guilty.

Emma J. McMahan, plaintiff appellant, filed her complaint charging Robert C. Daugherty, doing business as Yellow Cab Company, defendant appellee, with having injured her through the negligent operation of his taxicab by his servant, who was driving on West Harrison street, in Danville, Illinois, and who collided with her automobile, and also charging a violation of Section 49 of an act in relation to the regulation of traffic, approved July 9, 1935, Laws of Illinois, 1935, p. 1248, in that the driver of defendant's taxicab was operating it at a speed greater than reasonable and proper under the circumstances, said cab being operated in the business district of the city of Danville.

The evidence discloses that on June 6, 1936, plaintiff was driving north on Walnut street, near the intersection of Harrison and North Walnut streets. Her car was struck on the right-rear wheel by a west bound taxicab of defendant. Harrison street had been designated as a through street and there was a stop sign at the south side of the street.

The plaintiff contends that she came to a complete stop and after looking both ways, seeing no cars, started across the intersection. Defendant contends that plaintiff failed to stop and alleges that the injuries sustained by her were proximately caused by her own fault in failing to use ordinary care. The court overruled plaintiff's motion for a new trial and entered judgment in bar of the action. Among the points specified as grounds for a new trial and errors relied upon for a reversal of the judgment were the giving of erroneous instructions for defendant and an error in permitting a traffic stop sign, which had not

been admitted in evidence, to be taken into the jury room with other exhibits.

Counsel for plaintiff make the assertion and are substantiated by the evidence, that when George Wright, a witness for defendant, was testifying counsel produced a yellow traffic sign, two feet in size each way with the word stop in black letters about six inches high, and asked the witness and he was permitted to answer over plaintiff's objection whether there was that kind of a sign at the intersection at that time, to which the witness replied in the affirmative. Another witness in answer to a question said there was a stop sign there like the one on the wall. This stop sign on the wall was never marked as an exhibit or offered in evidence, although it was taken to the jury room with the other exhibits. Counsel for appellant insist that it was prejudicial to the rights of plaintiff to have the stop sign on the wall of the court room during the trial of the case. That the existence of a traffic sign at such intersection was admitted by plaintiff, and at no place in the record was that fact denied or questioned.

The production of the traffic sign by counsel for defendant and the examination of witnesses concerning the same and the placing of it on the wall of the court room and permitting it to remain there during the trial was not objected to by counsel for plaintiff so far as we can discover from an examination of the abstract of the record, neither was such conduct of counsel for defendant specified in plaintiff's motion for a new trial as a ground for reversal of the judgment. There is no doubt but that the court, if it had been appealed to, would have ordered the removal of the sign from the wall of the court room and from the presence of the jury, it being perfectly apparent that the only purpose of the exhibition of the same was to influence the jury in their decision of the cause. Conduct such as this should not go unnoticed. Permitting the traffic stop sign to be taken into the jury room and letting it remain there during the deliberations of the jury as to their verdict was not objected to at the time, nor was the attention of the court called to the fact that it had not been admitted in evidence as an exhibit and was being taken with the other exhibits into the jury room. However, we are of opinion that counsel for defendant are about right when they make the assertion, "there would be no error in the jury looking at the stop sign in the jury room when they had been looking at it all

day in the court room." Counsel for plaintiff cannot now complain as it was by their want of diligence that such error occurred.

Counsel for appellee calls attention to the fact that appellant failed to set out in full in their brief the instructions complained of, followed by definite and clear reasons supporting the alleged errors, incident thereto, and for that reason none of the alleged criticisms of instructions can be considered and the main part of the brief calls for no reply. While in some of the districts of the Appellate Court it is insisted that instructions complained of should be set out in full in the brief, and although that is a great convenience to the court, the Appellate Court of the Third District has no such rule, and if the instructions appear in full in the abstract of the record the rules are complied with.

Attorneys for appellee, although critical of the conduct of counsel for appellant in what was claimed to be a violation of the Rules of Practice of this court, themselves violated Rule 9 by quoting evidence in detail and in discussion and argument, in their statement of facts in their brief.

It is contended by appellee that no objection was made by plaintiff to the entry of judgment in bar of the action, and that plaintiff having failed to preserve an objection to this important ruling of the trial court, which has always preceded an exception, this case cannot be reviewed on appeal, and the appeal must be dismissed.

We fail to see any merit in this contention. It was never necessary to except to the entry of a judgment in order to assign error thereon, except in cases where a jury was waived and the cause was submitted to the court for trial, and after the amendment of Section 81 of the Practice Act of 1907, no exception to the entry of judgment was necessary in cases tried by the court. Neither is it necessary to object to the entry of a judgment by the court, in order to assign error on the entry thereof, although defects in judgments and decrees must be urged in the lower court, otherwise they are not subject to review.

After verdict and before final judgment appellant filed a motion for a new trial setting forth her points in writing, particularly specifying the grounds of such motion, and upon a denial of her motion for a new trial filed a notice of appeal, praecipe for record and a report of proceedings and the record of the case is in this court, all in proper time and said cause was taken for decision.

Complaint is made of the excessive number of instructions given at the request of defendant, considering the issues in the case. The practice of giving an excessive number of instructions has been repeatedly condemned. In our opinion the number given in the case at bar, at the request of defendant, was out of all proportion to the issues involved, which were simple. Instructions should be as few as possible, as otherwise they are likely to mislead the jury. It is the province of the jury to determine facts and then apply to them the law as set forth in the instructions of the court. Nine of the fifteen instructions given instructed the jury that plaintiff could not recover, if she was guilty of contributory negligence, while one instruction on that subject was all that was necessary. Nine of the instructions given concluded with the phrase, "then she cannot recover in this case" or "then you should find the defendant not guilty." The giving of an unnecessary number of such instructions has been held improper by the courts. Such repetitions of the idea that plaintiff must be free from contributory negligence in order to recover and the repeated conclusion of instructions with the phrase "then she cannot recover in this case" or "then you should find the defendant not guilty" was well calculated to lead the jury to believe that the court was of opinion that plaintiff was guilty of contributory negligence and that the jury should find the defendant not guilty. *Nelson* v. *Chicago City Ry. Co.,* 163 Ill. App. 98.

A large number of the given instructions are objecttionable because they are argumentative and not in proper form. Instructions should not only be applicable to the facts in evidence, but they should make application of the law they purport to state to the facts. *People* v. *Isbell,* 363 Ill. 264, 2 N. E. (2d) 84.

Instruction No. 2, after quoting the statute giving the right of way to vehicles approaching along intersecting higways from the right over those approaching from the left, then proceeds to inform the jury that if they believe from the evidence that the automobile driven by the plaintiff approached the intersection herein mentioned and the taxicab of defendant approached the intersection about the same time or at such speed that they should reach the intersection at or about the same time, it was the duty of plaintiff to yield the right of way. It is objected that the instruction is erroneous because it omits the element of due

care on the port of defendant, as he approached the intersection, citing the case of *Riddle* v. *Mansager,* 254 Ill. App. 68, where it is held: "The statute does not authorize such assertion of the right of way regardless of circumstances, distance, or speed." In *Salmon* v. *Wilson,* 227 Ill. App. 286, the court said: "It does not contemplate that the right of way be invoked when the car from the right is so far from the intersection at the time the car from the left enters it, that with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the line of intersection." The jury were not instructed as to the elements of due care and speed on the part of the driver of the taxicab as he approached the intersection and for that reason the instruction is erroneous.

A person driving a motor vehicle upon a public highway at a speed greater than is reasonable and proper having regard to the traffic and right of way or so as to endanger the life or limb or injure the property of any person will not be permitted to plead in defense of an action for personal injuries that his motor vehicle and the one driven by plaintiff were approaching along intersecting highways, and that he was aproaching from the right and had the right of way over the plaintiff who was approaching from the left, and that therefore he was not guilty.

Instruction No. 4 is a repetition of instruction No. 2 and was erroneous. Instruction No. 5 informed the jury that the driver of the taxicab had a right to assume that persons approaching Harrison street upon intersecting streets would observe the law and stop their automobile before entering upon said street. This instruction contains abstract propositions of law, and fails to refer to the evidence in the case and should not have been given. The evidence discloses that Harrison street, upon which the driver of the taxicab was proceeding in a westerly direction, was designated by an ordinance of the city of Danville as a through street and that all vehicles must come to a complete stop before entering or crossing the same and that by ordinance every driver operating a vehicle on a street in said city within the business section shall not exceed the maximum speed of 15 miles per hour. The evidence further discloses that Harrison street at its intersection with Walnut street was in the business section of said city.

This instruction failed to tell the jury that before the driver of the taxicab had a right to presume that an ordinary prudent man would bring his automobile to a full stop and obey said ordinance, that in approaching said intersection he, himself, must have driven his taxicab as an ordinarily prudent driver would have driven under the same or similar circumstances and not have exceeded the maximum speed of 15 miles per hour, if they believed from the evidence that such intersection was in the business section of Danville.

Neither should this instruction have been given for the reason that the record shows by the testimony of Meeker, the driver of the taxicab, that he did not know whether the plaintiff stopped her automobile or not, before entering the intersection, as he said the first he saw of it was when it shot up in front of him. Not having seen plaintiff approaching the intersection he could not have presumed that plaintiff would stop and the ordinance be obeyed. The evidence fails to show he regulated his conduct in any degree by any such presumption, or was misled in any way, or induced to act in any manner by anything done or omitted to be done by plaintiff. *Munns* v. *Chicago City Ry. Co.*, 235 Ill. App. 160.

Instruction No. 6 is improper as it instructs the jury that they would not be justified in finding a verdict for the plaintiff unless they believe from the evidence that the driver of the taxicab did something that he should not have done or failed to do something that he should have done as complained of in the complaint. This instruction is indefinite and not clear and the jury were left to determine for themselves what things charged in the complaint were legally necessary to be done or what things the driver legally failed to do that should have been done to create a legal liability for which the plaintiff brought suit.

Instruction No. 9 was as follows: "It is not every accident which makes a person liable for damage for a personal injury. If the accident was unavoidable so far as the defendant is concerned, then no liability is incurred by him, whether as a result of it a person is lightly or seriously injured, and if in this case the jury believe from all the evidence and under the instructions of the court, that so far as the defendant is concerned, the injury to the plaintiff was unavoidable, then the jury should find the defendant not guilty."

The jury are instructed that if the accident was unavoidable so far as the defendant was concerned, then no liability is incurred by him, and were further instructed that if the jury believe from the evidence that so far as the evidence is concerned, the injury to the plaintiff was unavoidable, then the jury should find the defendant not guilty. There was no evidence in the record upon which to found such an instruction as the defendant did not drive the taxicab, and so far as he was concerned the jury would be compelled to find that the accident was unavoidable, and would be compelled to find a verdict of not guilty as to the defendant.

Had the taxicab driver been substituted in the instruction in place of the defendant, as was probably intended, it would have been erroneous, as it fails to instruct the jury that they must first find from the evidence that at the time in question the taxicab was being operated in a reasonably prudent and careful manner and that the driver did all that a reasonably prudent person would have done under like circumstances. It is also bad because it was in effect an argument on behalf of defendant.

By instruction No. 11 the court instructed the jury as follows: "The court instructs you that in this case the employee of the defendant is a competent witness in this case, and you have no right to disregard the testimony of an unimpeached witness, sworn on behalf of said defendant, simply because such witness was or is an employee of the defendant, but it is the duty of the jury to receive the testimony of such witness, in the light of all the evidence, the same as you would receive the testimony of any other witness, and weigh it by the same principles and tests by which you determine the credibility of any other witness."

It was error to give this instruction as it singled out Meeker and informed the jury that he was unimpeached, and gave undue prominence to his testimony. It is for the jury to pass upon the credibility of the witnesses and the giving of this instruction invaded the province of the jury.

Defendant's instruction No. 15 directed a verdict and is as follows: "You have no right to assume or presume negligence on the part of the defendant or the driver of the taxicab, from the mere fact alone that an accident happened or in which the plaintiff may have been injured. Neither have you any right to assume that the plaintiff, herself, at and just before

the time of the accident in question, was in the exercise of due care and caution for her own personal safety. These are all material elements in the plaintiff's case and without affirmative proof on her part she is not entitled to recover."

In the case of *West Chicago St. Ry. Co. v. Petters*, 196 Ill. 298, the trial court refused to give the following instruction: "The court instructs the jury that no presumption of negligence arises against the defendant from the mere fact, of itself, that the plaintiff was injured in connection with the defendant's cars." The Supreme Court said of this instruction: "This class of instructions, which select one item of evidence or one fact disclosed by the evidence and state that a certain conclusion does not follow, as a matter of law, from that fact, are calculated to mislead and confuse the jury. If an instruction of this nature were held proper, it would be possible for a defendant to select each 'mere fact' constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, yet the whole, taken together, would, and thereby the court would be enabled to instruct the jury on the facts and take away the consideration of facts from them."

It cannot be said as a matter of law that no presumption of negligence arose from the mere happening of the accident. The question was one of fact for the jury. *Cohen v. Weinstein*, 231 Ill. App. 84, 101.

For the errors indicated the judgment of the circuit court of Vermilion County is reversed and the cause remanded to said court for a new trial.

Reversed and remanded.

(Seven pages in original opinion.)

IN THE

APPELLATE COURT OF ILLINOIS

Fourth District

October term A.D. 1938.

300 I.A. 615

Term No 21 Agenda 20

ARCHIE W. HOLEMON, Plaintiff-Appellee,	) Appeal from) City Court of) East St. Louis
vs.	)
ROYAL NEIGHBORS OF AMERICA, Defendant-Appellant.	) Honorable) W. F. Borders,) Judge Presiding.

Stone, J.

This is an appeal from a judgment of the City Court of East St. Louis in favor of plaintiff-appellee, Archie W. Holemon, and against defendant-appellant, Royal Neighbors of America, in a suit on an insurance policy. This case was previously considered by this court in HOLEMON v. ROYAL NEIGHBORS, 292 Illinois Appellate 648. The judgment of the City Court in favor of the plaintiff was reversed and the cause remanded for a new trial.

In its previous decision, this court held that the answers to questions in the application for insurance, which was a part of the policy sued on, were warranties and that if shown to be false there could be no recovery on the contract even if the statements were innocently made. This court further held that a part of the answers were false. The plaintiff contended that even though the answers and statements were warranties and were false, the judgment should be sustained for the reason that the medical examiner was the agent of the insurer and that he filled in the blank spaces in the report without first obtaining the information from the insured. We found that the witnesses for the plaintiff were not able to identify the medical report introduced in evidence by the defendant-appellant as the one they saw the insured sign at Dr. Hulick's office. We held that the plaintiff had failed to make the necessary proof to support the contention that the answers were not the answers of the assured. We do not find

APPELLATE COURT OF ILLINOIS

Fourth District

Letter from
Oct. 1948

300 I.A. 615

Term 1948

Opinion

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that the evidence presented at the second trial on this point is any different from that presented before. The plaintiff's theory apparently was that since only a "few" questions were asked of the assured, and since there were many questions on the application, the examining physician could not have asked the assured all of the questions which are answered on the application. There are only two witnesses on this point, the plaintiff and a Mrs. Miller. They apparently do not agree whether a question was asked concerning the occupation of assured's husband. The evidence discloses that the assured might have been at the office of the doctor at other times than the time when the application was signed. It is apparent that certain information as to weight and measurement of the assured was obtained at another time.

This court is bound by its previous decision in the matter that the statements were warranties and that the statements were false. The only question presented is whether the plaintiff has made the necessary proof to support the contention that the answers in the application were not the answer of the assured. We find that the plaintiff has failed to make this proof.

The judgment of the trial court is reversed. Reversed.

Abstract

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This court is bound by its previous decision in the matter that the statements were material and that the statements were false. The only question presented is whether the plaintiff has made the necessary proof to support the contention that the answers in the application are not the answer of the insured. We find that the plaintiff has failed to make this proof.

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Abstract

Borrower who signs this card is responsible for the return of the book.
Not Transferable.
Not to be taken from the Reading Room.
Sign legibly.
Obey these rules and avoid fines.

Date	Name		
11-6-79	S McGuin	977-7400	
1-6-81	J. Ybor	222-9350	
8-3-81	J. Block	222-9356	
July 18	[illegible]	621-9700	
7-11-82	P. Whitacre	493-0646	